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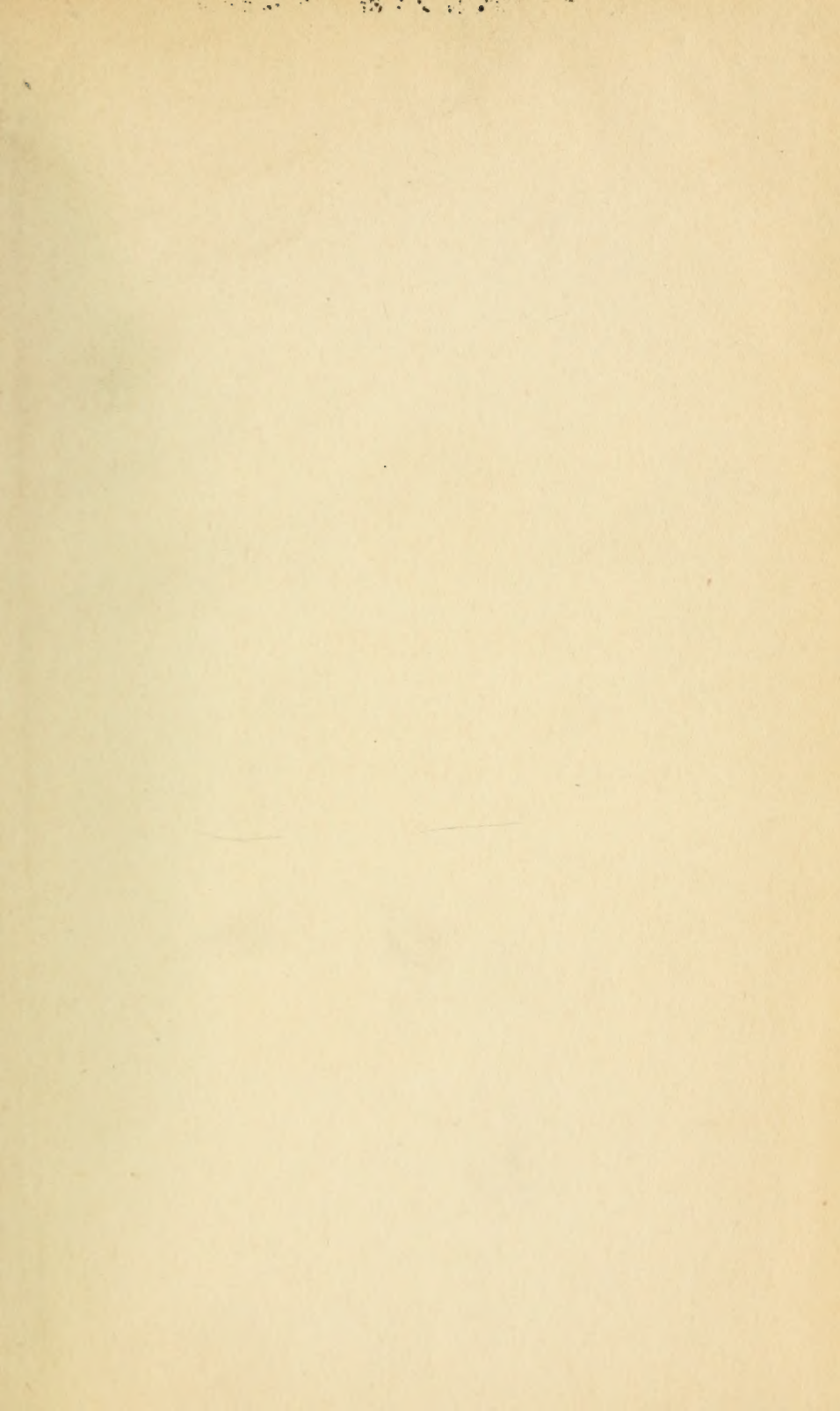


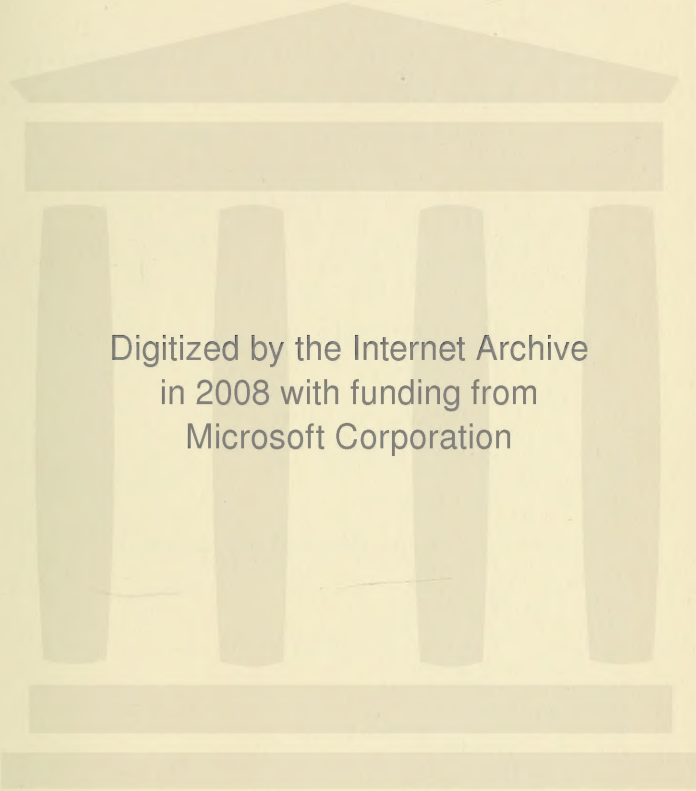
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HANDBOOK
OF
ADMIRALTY LAW

By ROBERT M. HUGHES, M. A.

¹¹¹
Of the Norfolk (Va.) Bar

ST. PAUL, MINN.
WEST PUBLISHING CO.

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This volume is respectfully dedicated to

Hon. NATHAN GOFF,

A genial and noble man,
An urbane, upright,
and able judge.

(v)*

PREFACE.

The germ of this treatise is a series of lectures on admiralty law, which the author has been giving to the senior law class at Washington and Lee University for the past few years. His experience there has emphasized the need of a text-book on marine law. Probably the lack of such a text-book is the explanation of the scant attention given to the subject in the law schools; but its constantly increasing importance seems now to demand more elaborate treatment than it has heretofore received. This is especially true in view of the recent important legislation bearing upon the subject, and its intimate connection with many other topics which are usually treated more fully, such as the law of carriers and the general substantive law in relation both to contracts and to torts. To meet the need of such a text-book, this treatise has been prepared. It is intended to be elementary, and is so arranged that those schools which give but slight attention to the subject of admiralty can use it by omitting certain chapters, and those which desire to give it more emphasis can supplement the text by the use of the table of leading cases, which are printed in large capitals throughout the book, and for which a special index has been prepared, giving an outline of the points passed upon by them.

The author hopes, also, that the book will be found useful to the very large class of general practitioners who wish to be in position to answer ordinary routine questions of admiralty law arising in practice. The failure of the law schools to treat this subject at any length results in the failure of the young bar generally to know anything about

it when they first commence to practice. It is hoped that this book will enable them to acquire a bird's eye view of the subject during those leisure hours which usually fall heavily upon the younger practitioner, and that it will also enable the more experienced general practitioners who do not make a specialty of admiralty to advise, at least on current questions, without the necessity of consulting a specialist.

In view of the elementary character of the work, the author cannot hope that the specialist in admiralty will find anything novel in his treatment of the subject, unless, perhaps, in one or two chapters where the law is not yet crystallized into very definite shape,—such as the chapter on death injuries and the chapter on the subject of damages,—and where the author's views may be of interest. At the same time, it is believed that the insertion in the appendix or in the main text of practically all the statutes which the admiralty practitioner usually needs will make it a useful *vade mecum*, obviating the necessity of handling, either in the office or at court, the cumbrous volumes in which these statutes are found. A list of the acts printed in full will be found in the index under the title "Statutes."

The author begs leave to express his acknowledgments to many friends for suggestions and aid. He also wishes to acknowledge publicly the numerous courtesies received at the hand of the publishers.

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HANDBOOK OF ADMIRALTY LAW.

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OF THE ORIGIN AND HISTORY OF THE ADMIRALTY AND ITS EXTENT IN THE UNITED STATES.

1. Origin and History.
2. The Admiralty Classics.
3. The Colonial Admiralty Jurisdiction, and Constitutional Grant of
"Admiralty and Maritime Jurisdiction."
4. The Waters Included.
5. The Craft Included.

ORIGIN AND HISTORY.

1. The admiralty law originated in the needs of
commerce and the custom and usage of mer-
chants.

In the dawn of recorded story, when mythology and history were too intermingled to separate the legendary from the authentic, commerce by means of ships was drawing the nations together, and beginning to break down the barriers of prejudice and hostility due to the difficulty and danger of land communication. The voyage of the Argonauts, the Trojan Expedition, the wanderings of Odysseus, though military in the songs of Homer, were probably as much for exploration as for conquest; as merchants and warriors were combined in one person of necessity. The

enterprising Rhodians had not only a commerce, but a Code, in which is found the germ of the law of general average. The shrewd Phœnician traders were carriers for the wise Solomon, and planted trading colonies throughout the Mediterranean. Their Carthagenian descendants were their worthy successors. Until Rome copied their trireme, her domain was limited to Italy. When maritime skill supplemented military prowess, and placed at her command new and easier lines of advance, she overran the world. The mart soon replaced the camp; for it is a teaching of history that in the providence of God the havoc of war but opens new avenues for the arts of peace.

In the Middle Ages the hardy Italian republics became the carriers of the world, and reached a high plane of enlightenment. The Saracen civilization could compare favorably with that of the West; and the Italians, in their constant warfare against Mohammedanism, acquired and assimilated this civilization, and spread it over Europe. Venice, Florence, Pisa, and Genoa furnished the mariners who scattered the gloom of the dark ages; who civilized the old world, and discovered the new.

The Conflict between the English Common Law and Admiralty Courts.

The modern student who observes the present colossal commerce and maritime power of England finds it hard to realize how recent is its development. Yet it is a fact that our English ancestors were not by nature addicted to maritime enterprise. The Anglo-Saxon loved the quiet recesses of the forest, and was reluctant to venture on the water. He could not be made to understand that his only security against the Danes, who harried the British coast, was to meet them at sea. The naval victory of Alfred was sporadic, and the sea power of the Danes soon enabled them to overrun and conquer England. Even the Danish conquest did not infuse sufficient maritime blood to overcome the Saxon

propensity to remain on terra firma. During many months William the Conqueror was engaged in fitting out his fleet and army in sight of their coast, yet no effort was made to harass him on the voyage, or resist his landing. It is difficult to understand that the victims of Hastings and the victors of the Hogue were of the same nation.

Prior to the reign of Elizabeth, many continental nations surpassed England in maritime enterprise. Such were the Spaniards, Portuguese, Dutch, and even the French. She it was who first grasped England's true policy, and the age of Bacon and Shakespeare in letters was the age of Drake and Frobisher and Raleigh in navigation. The disgraceful reign of her successor, James I., brought about a partial reaction. Lord Coke, the great apostle of the common law, was the leader in the attack on the admiralty, issuing prohibitions to its courts, and in every way curtailing its jurisdiction. His persecution of Raleigh, the great navigator, was but the personification of his hatred for the new order of things.

In consequence of this common-law hostility, English commerce was long retarded, just as was the jurisdiction of the English admiralty. The reigns of the Stuarts up to the English commonwealth were noteworthy for a tendency to cultivate friendly relations with Spain, thus checking the enterprise of the great sea captains who had long made relentless war against her. Charles II. and James II. were more subservient to France than their ancestors had been to Spain, so that the steady growth of English commerce hardly antedates the eighteenth century.

Meanwhile the common-law judges had put fetters upon the marine law of England which could not be so easily cast off. Anything continental or international in origin met their determined resistance. It was long before the English courts were willing even to admit that the law and custom of merchants, to which England owes its greatness of to-day, was a part of English law; or that it was more

than a special custom, necessary to be proved in each case. In consequence of this sentiment, the English admiralty jurisdiction at the time of the American Revolution was much restricted, being narrower than the continental admiralty, and far narrower than the present jurisdiction of the American and English admiralty courts. In England an act of parliament was necessary to enlarge their restricted jurisdiction to its ancient extent.¹ In the United States the same result has been achieved, so far as necessary, by much judicial, and some congressional, legislation.

THE ADMIRALTY CLASSICS.

2. The sources of the admiralty law lie in the reason of man as educated by international trade relations, and are evidenced by the great admiralty classics.

The law of the sea is not the product of any one brain, or any one age. It is the gradual outgrowth of experience, expanding with the expansion of commerce, and fitting itself to commercial necessities. It is practically a branch of the law merchant, on account of their intimate connection; and grew, not from enactment, but from custom; not from the edicts of kings, but from the progressive needs of society.

The Ancient Codes and Commentators.

Yet there are various compilations and treatises which evidence the maritime law of their respective dates, and are valuable for reference, because they did not originate the

§ 1. ¹ The modern English admiralty jurisdiction is regulated by statute, and is as extensive as could be desired. The principal statutes are: 3 & 4 Vict. c. 65; 9 & 10 Vict. c. 99; 17 & 18 Vict. c. 104, § 476; 24 & 25 Vict. c. 10; 31 & 32 Vict. c. 71. All but the second of these will be found in the appendix to Abbott's Law of Merchant Ships & Seamen.

provisions on the subject, but merely reduced to concrete form the customs and practices which had grown up independent of codes and commentators. These are the great classics of marine law, which occupy to it the relation that Bacon's Abridgment or Coke's and Blackstone's writings bear to the common law of England.

The Roman Civil Law contains many provisions regulating the rights and responsibilities of ships.

The Digest quotes from the ancient Rhodian Code its provision as to contribution of interests in general average. It contains provisions also in relation to the liability of vessels for injury to cargo, for punishment of thieves and plunderers, and for borrowing on bottomry or respondentia.¹

The Consolato del Mare is a collection of marine laws antedating the fifteenth century, though neither its author nor its date is known. It is probably a compilation of the marine customs then in vogue among the trading nations of Europe, and may be found in the collection of maritime laws made by Pardessus.

The Laws of Oleron take their name from the island of Oleron off the French coast, and show the customs then prevailing in respect to many of the most important subjects relating to shipping. They are supposed to have been compiled under the direction of Eleanor of Aquitaine, who, as queen, first of France and then of England, and as regent of the latter during the absence of her son Richard Cœur de Lion on the Crusades, was impressed with the importance of such a work.

The Laws of Wisbuy, a city of the island of Gothland, in the Baltic, are very similar to the Laws of Oleron, and were probably based upon them.

The Ordonnance de la Marine of Louis XIV. is the best vindication of France from the charge that her people are

§ 2. ¹ Dig. 14, 2; 4, 9; 22, 2; 47, 5; 47, 9.

not fitted for maritime enterprise. It was published in 1681, and is a learned and accurate digest of marine law and usages, and the best evidence to this day of the extent and nature of the admiralty jurisdiction.

The Laws of Oleron, the Laws of Wisbuy, and the Ordonnance were printed as an appendix to Peters' Admiralty Decisions. They have recently been reprinted, along with the Laws of the Hanse Towns and other interesting matter of the same sort, as an appendix to volume 30 of the Federal Cases, thus rendering them easily accessible.

In 1760, Valin, a distinguished advocate of Rochelle, published a commentary on the Ordonnance, in two quarto volumes, which ranks in authority as high as the Ordonnance itself.

Cleirac, another French writer, published at Bordeaux, about the middle of the seventeenth century, his work "Us et Coustumes de la Mer," which contains the Laws of Oleron, of Wisbuy, of the Hanse Towns, and many other continental provisions, with valuable annotations of his own.

The treatise of Roccus "De Navibus et Naulo," the writings of Casaregis on mercantile subjects, and those of Pothier in the same field, especially that on maritime hiring, are equal in authority to any of those previously named.

The American Authorities.

In the United States the marine classics are mainly decided cases. The only treatise covering the whole field is the excellent two-volume work of Parsons on Shipping and Admiralty, which cannot be commended too highly. Its only fault is that it was published thirty years ago. There are other good works on separate departments of marine law; such as Marvin's work on Salvage, Dunlap's Admiralty Practice, Betts' Admiralty Practice, Spencer's work on Collisions, and especially Benedict's treatise on Admiralty Practice, which is indispensable on the subject of which it treats.

As to the European codes and works above named, it must be borne in mind that they are only persuasive authority. They are evidence of the general maritime law, and not necessarily of our maritime law, except in so far as they have been adopted by us. As was well said by Mr. Chief Justice Tilghman in an early Pennsylvania case: "They and the commentators on them have been received with great respect both in the courts of England and the United States, not as conveying any authority in themselves, but as evidence of the general marine law. When they are contradicted by judicial decisions in our own country, they are not to be regarded, but on points which have not been decided they are worthy of great consideration."²

THE COLONIAL ADMIRALTY JURISDICTION, AND CONSTITUTIONAL GRANT OF "ADMIRALTY AND MARITIME JURISDICTION."

3. The grant of "admiralty and maritime jurisdiction" to the federal courts in the constitution means the jurisdiction exercised by the colonial and state admiralty courts, and not the narrower jurisdiction of the English courts.

Prior to the Revolution, the several colonies had admiralty courts by virtue of commissions from the crown. These commissions conferred a jurisdiction much wider than that of the same courts in the mother country.¹

On the Declaration of Independence, each colony became a separate nation, and organized its own system of courts.

² 30 Fed. Cas. 1203. See, also, *THE LOTTAWANNA*, 21 Wall. 558, 22 L. Ed. 654.

§ 3. ¹ An idea of its extent may be gathered from Lord Cornbury's vice admiral's commission, set out in extenso in section 124 et seq., Ben. Adm.

Although the abuses of power in revenue matters had been one of the grievances which led to the Revolution, and contributed an indignant sentence to the Declaration of Independence, the different colonies practically adopted the jurisdiction of the colonial vice admiralty courts for their own, impressed by its advantages to their nascent shipping, and they disregarded the confined limits of the British marine tribunals. The Virginia statute of 1779 is a good illustration:

"Be it enacted by the general assembly, that the court of admiralty, to consist of three judges, any two of whom are declared to be a sufficient number to constitute a court, shall have jurisdiction in all maritime causes, except those wherein any parties may be accused of capital offenses, now depending and hereafter to be brought before them, shall take precedence in court according to the order in time of their appointment, and shall be governed in their proceedings and decisions by the regulations of the congress of the United States of America, by the acts of the general assembly, by the Laws of Oleron and the Rhodian and Imperial Laws, so far as they have been heretofore observed in the English courts of admiralty, and by the laws of nature and of nations."²

These courts were in active operation from the date when the colonies declared their independence in 1776 to the adoption of the constitution in 1789.

THE WATERS INCLUDED.

4. The waters included in the admiralty jurisdiction are all waters, whether tidal or not, navigable for commerce of a substantial character.

² 10 Hen. St. p. 98.

Repudiation of Ancient Tidal Test for Test of Navigability.

Article 3, § 2, of this instrument extended the judicial power of the United States, inter alia, "to all cases of admiralty and maritime jurisdiction." It was long assumed without examination that the measure of the jurisdiction referred to in this clause was that of the English admiralty courts at the time of the Revolution. Their standard was the reach of the tides. In the contracted islands of the mother country there were no navigable waters that were not tidal. And so, when the question first came before the supreme court, it decided that the domain of the American admiralty was bounded by the ebb and flow of the tide.¹ But this rule soon became embarrassing. In the case of *Peyroux v. Howard* ² the court found itself gravely discussing whether a slight swell at New Orleans could properly be called a tide. Our early statesmen, living in weak communities strung along the Atlantic Coast, did not realize the possibilities of the boundless West, inaccessible from its barrier of mountains and savages. Jay, our first chief justice, had been willing to barter away the navigation of the Mississippi, and even to restrict the export of cotton, which laid the foundation of our national wealth. The mighty rivers and their tributaries which gave access to a continent, the great lakes of our northern border, which had witnessed some of our most notable feats of arms, were by this tidal test relegated to a place with the English Cam and Isis,—not wide enough for a boat race. The restriction could not be endured, and so the court gradually broke away from English traditions. In the case of *Waring v. Clarke* ³ it decided that our constitution did not mean to adopt the English standard, and that the admiralty could take cognizance of controversies maritime in their nature, even though they arose in the body of a county. This first

§ 4. ¹ *The Thomas Jefferson*, 10 Wheat. 428, 6 L. Ed. 358.

² 7 Pet. 342, 8 L. Ed. 700.

³ 5 How. 441, 12 L. Ed. 226.

step was but a preliminary to entire emancipation, and its corollary was *THE GENESEE CHIEF*,⁴ which repudiated the tidal test entirely, and held that the true criterion of jurisdiction was whether the water was navigable.

Since then the court has frequently said that the grant of jurisdiction in the constitution referred, as to subject-matter, not to the curtailed limits of the English admiralty, but to the system with which its framers were familiar; and this was the colonial and state admiralty, which was practically coincident with the ancient continental admiralty.⁵

What are Navigable Waters.

It is not easy to say as matter of law exactly what waters are navigable in this sense. Care must be taken to distinguish between the clause granting the admiralty jurisdiction to the federal courts and the clause granting to congress the power to regulate interstate and foreign commerce. The supreme court has frequently said that they are independent of each other. Yet the admiralty jurisdiction is at least as extensive as the commercial clause. It extends to waters navigable by craft of sufficient bulk to be engaged in interstate commerce, even though such waters lie entirely within the limits of a state and above tide water, and even though the voyage be between ports of the same state.⁶

Under the commerce clause the phrase "navigable waters" has been often considered. The case of *THE DANIEL BALL*,⁷ was a proceeding against a steamer for violating the federal license laws. She navigated entirely within the state of Michigan, on a short river, and drew only two feet of water. The river emptied into Lake Michigan. In

⁴ 12 How. 463, 13 L. Ed. 1058.

⁵ *THE LOTTAWANNA*, 21 Wall. 558, 22 L. Ed. 654; *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373.

⁶ *The Magnolia*, 20 How. 296, 15 L. Ed. 909; *IN RE GARNETT*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631

⁷ 10 Wall. 557, 19 L. Ed. 999.

the course of the opinion the court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In *Leovy v. U. S.*⁸ the court upheld an act of the Louisiana legislature authorizing the damming of a small bayou for the purpose of reclaiming the lands bordering thereon. It was shown that only fishermen and oyster boats used it. The court said that, in order to be public navigable waters, there should be "commerce of a substantial and permanent character conducted thereon."

It is an interesting question whether the admiralty jurisdiction extends over the waters of a lake entirely within the borders of a state, and without any navigable outlet. In the case of *United States v. Burlington & Henderson County Ferry Co.*⁹ Judge Love seems to think that such waters are without the admiralty jurisdiction, though the point was not directly involved. In *Stapp v. The Clyde*¹⁰ the question was necessarily involved, and the court decided that such waters were not of admiralty cognizance.

Artificial as well as natural water ways come within the jurisdiction of the admiralty. In *The Oler*¹¹ this was decid-

⁸ 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914.

⁹ (D. C.) 21 Fed. 331.

¹⁰ 43 Minn. 192, 45 N. W. 430.

¹¹ 2 Hughes, 12, Fed. Cas. No. 10,485.

ed as to the Albemarle and Chesapeake Canal. Afterwards, in *Ex parte Boyer*,¹² the supreme court upheld the jurisdiction in case of a collision between two canal boats on the Illinois and Lake Michigan Canal, an artificial canal entirely within the limits of a state, but forming a link in interstate communication, though the vessels themselves were on voyages beginning and ending in the state.

THE CRAFT INCLUDED.

5. The character of craft included in the admiralty jurisdiction is any movable floating structure capable of navigation and designed for navigation.

The evolution of the ship from the dugout or bark canoe to the galley with gradually increasing banks of oars, then to the sail vessel with masts and sails constantly growing and replacing the human biceps, then to the self-propelling steamers, reckless of ocean lanes and calm belts, is one of the miracles of progress. As to all of these the jurisdiction of the admiralty is clear. But hardly less important, at least in local commerce, are the various nondescripts which dot our harbors, like lighters, rafts, car floats, floating docks, dredges, and barges with no motive power aboard.

Here, again, it must be remembered that the admiralty clause of the constitution, and not the commerce clause, is being considered. A vessel need not necessarily be engaged in commerce to come within the jurisdiction, though, if it was, the jurisdiction would be clear. The true test seems to be capability of navigation and the *animus navigandi*. The very same structure, when permanently attached to the shore, and thereby becoming a practical extension of the shore, without any intent of moving, might be out of the jurisdiction; and yet, if temporarily attached,

¹² 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056.

and designed to be shifted from place to place by water, it might be within the jurisdiction.

The leading case on this subject is *COPE v. VALLETTE DRY-DOCK CO.*¹ There the court held that the jurisdiction did not include a floating dry dock permanently attached to the shore at New Orleans, and not intended for navigation. It had been moored to the same place for twenty years. Had it been designed to be towed around to different places in the harbor, even that would have been navigation sufficient, and in such case the court would probably have taken jurisdiction. It is difficult to reconcile with this the case of *Woodruff v. One Covered Scow*,² in which Judge Benedict took jurisdiction of a floating boathouse permanently attached to a wharf to afford access to shore for persons from small boats. As the Vallette Dry-Dock Case was only decided on January 10, 1887, and this case on February 18, 1887, it is likely that the former was not known to Judge Benedict.

Under the jurisdiction are included lighters of the simplest kind, for even they are considered to "appertain to travel or trade or commerce."³

A floating elevator, used for the storage of grain, but designed to be moved from place to place in a harbor, is included.⁴

There are many cases extending the jurisdiction over dredges, both those which lift the mud by dippers, and deposit it in scows to be towed away, and those which work on a sucking principle, drawing the mud from the bottom, and delivering it on shore by long lines of pipe.⁵

§ 5. ¹ 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501.

² (D. C.) 30 Fed. 269.

³ The General Cass, 1 Brown, Adm. 334, Fed. Cas. No. 5,307; The Wilmington (D. C.) 48 Fed. 566.

⁴ The Hezekiah Baldwin, 8 Ben. 556, Fed. Cas. No. 6,449.

⁵ Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476; McRae v. Dredging Co. (C. C.) 86 Fed. 344; The Mac, 7 Prob. Div. 126.

The same is true of floating movable derricks, and pile drivers.⁶

On the other hand, a marine pump dredge, capable of being moved from place to place, but resting on piles, and not floating, has been very properly held to be excluded from admiralty cognizance.⁷

In *The Public Bath No. 13*⁸ Judge Brown held that a bath house built on boats, and made to shift from place to place, is within the jurisdiction. This, and the case of *U. S. v. Burlington & Henderson County Ferry Co.*,⁹ are good illustrations of cases where the courts treat navigability irrespective of trade or commerce as the proper test of the admiralty jurisdiction in contradistinction to the powers of congress under the commerce clause of the constitution.

In construing the meaning of the word "ship" under the English statutes conferring jurisdiction on the admiralty courts, the house of lords has held that a floating gas buoy, which had been broken loose, and had been saved, could not be libeled for salvage, as it was not designed either for navigation or for use in commerce.¹⁰

*The Hendrick Hudson*¹¹ was a dismantled steamer, which was being used as a hotel. While being towed to another place, it was in peril, and salvage services were rendered to it. The court held that it was not within the cognizance of the admiralty.

This decision would seem to be out of line with the more

⁶ *Maltby v. A Steam Derrick*, 3 Hughes, 477, Fed. Cas. No. 9,000; *Lawrence v. Flatboat* (D. C.) 84 Fed. 200; *Southern Log Cart. & Supply Co. v. Lawrence*, 30 C. C. A. 480, 86 Fed. 997. Judge Swan has held otherwise. *Pile Driver E. O. A.* (D. C.) 69 Fed. 1005.

⁷ *The Big Jim* (D. C.) 61 Fed. 503.

⁸ (D. C.) 61 Fed. 692.

⁹ (D. C.) 21 Fed. 331.

¹⁰ *The Gas Float Whitton No. 2* [1897] App. Cas. 337.

¹¹ 3 Ben. 419, Fed. Cas. No. 6,355.

recent authorities. Whether the structure was a hotel or a steamboat, it was engaged in actual navigation. Had the Vallette Dry Dock been so engaged, the supreme court would probably have sustained the jurisdiction.

Rafts.

Whether a raft is such a structure as to come under the jurisdiction cannot be considered as settled. The Vallette Dry-Dock Case seems, in its reasoning, to assume that ships and cargoes of ships alone come under the jurisdiction, and that floating merchandise, never in any way connected with a ship, is not included. Yet in its concluding paragraph it mentions the case of rafts, and cites several well-considered decisions sustaining the jurisdiction, but without expressing either approval or disapproval.

In *Seabrook v. Raft of Railroad Cross-Ties*,¹² Judge Simonton, in sustaining jurisdiction, well says that rafts were the original methods of water locomotion. As they are navigated, and designed to be navigated, and not tied permanently to one place, like a dry dock, it would seem that the weight of reasoning is in favor of the jurisdiction in such case.

¹² (D. C.) 40 Fed. 596.

CHAPTER II.

OF THE ADMIRALTY JURISDICTION AS GOVERNED BY THE SUBJECT-MATTER.

- 6. Cases in Contract and Cases in Tort.
- 7. Tests of Jurisdiction.
- 8-10. Contracts of Seamen.
- 11. Master's Right to Proceed in Rem for His Wages.
- 12-19. Pilotage.

CASES IN CONTRACT AND CASES IN TORT.

6. The sources of admiralty jurisdiction, as in other branches of substantive law, naturally subdivide into rights arising out of contract and rights arising out of tort.

(a) Rights arising out of contract are maritime when they relate to a ship as an instrument of commerce or navigation, intended to be used as such or to facilitate its use as such.

(b) Rights arising out of tort are maritime when they arise on public navigable waters.

7. TESTS OF JURISDICTION—The test of jurisdiction is different in each of these classes of cases.

(a) The test in contract cases is the nature of the transaction.

(b) The test in tort cases is the locality.

In the warfare made by the common law upon the admiralty courts, one line of common-law attack was the contention that only contracts were maritime which were made upon the sea, and to be performed upon the sea; thus at-

tempting to apply to contractual rights, as well as torts, the test of locality. Under the English decisions this distinction excluded many subjects of marine cognizance which the Continental admiralty undoubtedly covered. In some of the earlier decisions of this country traces of this distinction may also be found. But it is now well settled that the test in matters of contract is irrespective of locality, and depends entirely upon the nature of the transaction. In England itself the restriction became so intolerable that an act of parliament was necessary, and accordingly the act defining the jurisdiction of the admiralty courts restored the ancient admiralty jurisdiction to such an extent that the modern English courts have a jurisdiction as wide as the Continental or American courts.

What Contracts Are Maritime by Nature.

It is difficult to lay down any definition which is beyond criticism. The courts have in many instances said whether certain particular controversies were maritime or not, but no satisfactory definition has yet been enunciated which will enable the student to say in advance whether a given case is marine or not. In *DE LOVIO v. BOIT*,¹ Mr. Justice Story, in holding that contracts of marine insurance are within the admiralty jurisdiction, discusses with great learning the ancient extent of that jurisdiction, naming in more than one connection the general subjects which writers and codifiers had enumerated, and says that it includes "all transactions and proceedings relative to commerce and navigation"; also "all contracts which relate to the navigation, business, or commerce of the sea."

In the case of *New England Mut. Marine Ins. Co. v. Dunham*² the court says: "The true criterion is the nature and subject-matter of the contract as to whether it was a

§§ 6-7. ¹ 2 Gall. 398, Fed. Cas. No. 3,776.

² 11 Wall. 1, 20 L. Ed. 90.

maritime contract, having reference to maritime services or maritime transactions."

In the case of *Zane v. The President*,³ Mr. Justice Washington says: "If the subject-matter of a contract concerned the navigation of the sea, it is a case of admiralty and maritime jurisdiction, although the contract be made on land." The case was a proceeding by a material man.

The case of *Wortman v. Griffith* ⁴ was a suit by the owner of a shipyard for the use of his marine ways by the vessel. Mr. Justice Nelson decided that the admiralty had jurisdiction, saying: "The nature of the contract or service, and not the question whether the contract is made or the service is rendered on the land or on the water, is the proper test in determining whether the admiralty has or has not jurisdiction."

Under the test as laid down, the mere fact that a ship may be incidentally connected with the transaction does not make the matter maritime. One or two illustrations will show the distinction.

In the case of *Ward v. Thompson* ⁵ there was an agreement between certain parties to carry on a trade venture, one contributing a vessel and the other his skill and labor, on the basis of a division of profits on a fixed ratio. The court held that this was nothing but an ordinary common-law agreement of partnership, and was not made maritime by the mere fact that a ship was part of the partnership property.

The case of *Bogart v. The John Jay* ⁶ was a proceeding in admiralty to foreclose a mortgage on a vessel. There was nothing to show that the money had been borrowed for any purpose connected with the use of the vessel, and the only connection the vessel had with it was the

³ 4 Wash. C. C. 453, Fed. Cas. No. 18,201.

⁴ 3 Blatchf. 528, Fed. Cas. No. 18,057.

⁵ 22 How. 330, 16 L. Ed. 249.

⁶ 17 How. 399, 15 L. Ed. 95.

mere fact that it was his security for the debt, just as a horse or any other piece of personal property might have been. It was held that admiralty had no jurisdiction.

In the case of *Minturn v. Maynard*⁷ the supreme court decided that an admiralty court had no jurisdiction of mere matters of account, even though they were accounts relating to a ship.

In the case of *The Illinois*⁸ a party had leased the privilege of running a bar on a passenger steamer plying between Memphis and Vicksburg. When the vessel fell into trouble, and was libeled by some other creditor, he, too, came into the admiralty court, and claimed that this was, in effect, a charter of part of the vessel, and that he had a remedy in admiralty. The court, however, could not see that a transaction of this sort had any maritime characteristics, and decided that there was no jurisdiction.

In the case of *Doolittle v. Knobeloch*⁹ the owner of a vessel had employed the libellant to purchase a steamer for him, and to look generally after his interests in bringing the steamer from New York to Charleston, though not in connection with any navigation of the vessel. He attempted to collect his money by a proceeding in rem against the vessel and in personam against the owner. The court decided that it was not an admiralty contract.

If the principal contract is maritime, the jurisdiction of the court is not ousted by the fact that some incidental question growing out of it would not be maritime in case it stood alone.¹⁰

On the other hand, mere preliminary contracts looking to a formal contract are not maritime, even though the contract itself, when executed, may be so. For instance, a

⁷ 17 How. 477, 15 L. Ed. 235.

⁸ 2 Flap. 383, Fed. Cas. No. 7,005.

⁹ (D. C.) 39 Fed. 40.

¹⁰ *The Charles F. Perry*, 1 Low. 475, Fed. Cas. No. 2,616; *The Louisiana* (C. C.) 37 Fed. 261.

contract of charter party partly performed is clearly maritime, but a preliminary agreement to make a contract of charter party is not maritime.¹¹

The same general transaction may be maritime in one case and not maritime in another. As emphasizing this distinction, there is the maxim that "a ship is made to plough the seas, and not to lie at the walls." Hence, wharfage rendered to a ship while loading or unloading, or in her regular use as a freight-earning enterprise, is a maritime contract.¹²

On the other hand, wharfage to a ship laid up for the winter while waiting for the season to open is not maritime.¹³

This same distinction is further illustrated by the decisions in relation to watchmen on vessels. Those who are watchmen while vessels are in port during voyages are considered as having made a maritime contract, but those who have charge of her while laid up have no such contract.¹⁴

CONTRACTS OF SEAMEN.

8. Every person who shall be employed or engaged to serve in any capacity on board a vessel shall be deemed and taken to be a seaman.
9. Seamen are the wards of the admiralty, and have a prior claim for their wages.
10. Their contracts are governed by the ordinary rules of contract except as modified by stat-

¹¹ *Andrews v. Insurance Co.*, 3 Mason, 6, Fed. Cas. No. 374; *The Tribune*, 3 Sumn. 144, Fed. Cas. No. 14,171; *Oakes v. Richardson*, 2 Low. 173, Fed. Cas. No. 10,390; *The Eugene*, 31 C. C. A. 345, 87 Fed. 1001.

¹² *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373.

¹³ *The C. Vanderbilt* (D. C.) 86 Fed. 785.

¹⁴ *The Erinagh* (D. C.) 7 Fed. 231.

ute, and by the disposition of the courts to guard them against imposition, and except that force may be used to compel obedience to lawful orders, on account of the peculiar nature of the service.

The contracts of seamen have always been considered among the most important in the admiralty, as a good crew is the most important outfit that a ship can have. Her construction may be the best that modern ingenuity may produce. Every device of recent invention may be lavished upon her. Yet, unless she has a brain to direct her course, and skillful hands to regulate the pulsations of her engines and manage her numerous complicated machinery, her propeller is paralyzed, her siren is dumb. She is like the human body when the soul has departed. Mere machinery is of but little service unless intelligently handled. It is not the gun, but the man behind it, that is formidable; and in modern as in ancient times the personal equation is still controlling. On this account the utmost encouragement and the fullest protection to seamen are the established policy of the admiralty law.

Who Are Seamen.

As the courts have been liberal in their construction of the word "ship," they have been equally so in deciding what constitutes a "seaman," in the modern sense. The term is not limited to those who actually take part in the navigation of the ship. Every one who is regularly attached to the ship, and contributes to her successful handling, is a seaman, though he may not know one rope from another.

The definition above given is the exact language of section 4612 of the Revised Statutes. For instance, as a dredge has been considered a ship, so the men who operate it are held to be seamen.¹

§§ 8-10. ¹ Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476.

Fishermen and sealers, who go for that sole purpose, are held to be seamen.²

The wife of the cook, engaged by the master as second cook, is a mariner in this sense.³

So, too, the clerk of a steamboat.⁴

On account of the peculiar character of seamen, the courts scrutinize closely their contracts, in order to protect them from imposition. They are improvident and wild, easily imposed upon, and the constant prey of designing men. Their rights, in modern times, are largely governed by statute. In the United States the statutory provisions regulating them are contained in sections 4501-4612 of the Revised Statutes. This codification of the law in relation to them, however, has been much amended and modified by subsequent legislation, though its general policy has been but little changed. The subsequent acts modifying them will be found in the notes.⁵ A detailed discussion of the particular effect of those amendments is impracticable for want of space.

Statutory Provisions.

The first provisions relate largely to the method of their engagement, requiring shipping articles carefully prepared and publicly executed, and providing penalties for the violation of such articles. In cases of ambiguity in construing these articles, the courts lean in favor of the seamen.⁶

The next class of provisions relates to seamen's wages and effects. It was an old maxim of the English admiralty

² The Minna (D. C.) 11 Fed. 759; The Ocean Spray, 4 Sawy. 105, Fed. Cas. 10,412.

³ The James H. Shrigley (D. C.) 50 Fed. 287.

⁴ The Sultana, 1 Brown, Adm. 13, Fed. Cas. No. 13,602.

⁵ Act June 9, 1874 (18 Stat. 64); Act June 26, 1884 (23 Stat. 53); Act June 19, 1886 (24 Stat. 79); Act Aug. 19, 1890 (26 Stat. 320); Act Feb. 18, 1895 (28 Stat. 667); Act March 3, 1897 (29 Stat. 687); Act December 21, 1898 (30 Stat. 755).

⁶ Wope v. Hemenway, 1 Spr. 300, Fed. Cas. No. 18,042.

law that "freight is the mother of wages," though there were many exceptions to it, and its true limits have not been always understood. This rule no longer prevails in the United States under the statutory provisions referred to. The ancient rule and its limitations may be seen from the opinion of Mr. Justice Woodbury in the case of *The Nippon*.⁷

In order to protect a seaman from imposition, the statutes render void any agreement by him waiving any remedies for his wages, and forbid any assignment or attachment of them.

Under the practice of the admiralty courts, a seaman is not required to give the usual stipulation for costs when he libels a vessel. But, in order to protect the vessel from being arrested on frivolous charges, the law requires that, before issuing any libel, he must cite the master to appear before a commissioner to show cause why process should not issue. The commissioner thereupon holds a sort of preliminary examination, and issues process if he thinks there is sufficient justification for it.

The statutes also contain elaborate provisions for the seaman's discharge, and for his protection in relation to the character of the vessel, the character of the food and medicine furnished, his clothing, etc., for which reference must be made to the statutes.

Priority of Lien.

Under the same policy, the admiralty courts have always held that, as a general rule, the wages of seamen constitute among contract claims the first lien upon the ship, and adhere to it as long as a plank is left afloat.⁸

There may be circumstances in which other liens would be preferred to seamen's wages, as where salvors bring a ship in, and thereby save the ship for the seamen as well as

⁷ Brunner, Col. Cas. 577, Fed. Cas. No. 10,277.

⁸ See, also, *The Ocean Spray*, 4 Sawy. 105, Fed. Cas. No. 10,412.

others; but these cases are exceptional, and cannot be discussed, at least in this connection, in detail.⁹

Enforcing Obedience.

In one respect the contracts of seamen vary materially from ordinary contracts. The general rule in the usual contracts of hiring is that suit or discharge is the only remedy for its violation. On the other hand, the importance of preserving discipline upon a vessel, and of performing the services necessary for her protection, and for the protection even of life, justifies the master in using physical force to a reasonable extent in order to enforce obedience. It is hard to draw the exact limits, but it may be said in general that a master may inflict blows for the purpose of compelling obedience to an order, or may put mutinous seamen in irons or in confinement as a punishment, or may forfeit their wages for misconduct. In fact, under exceptional circumstances of aggravation, the master may even take life. But the other officers of the ship cannot punish for past offenses. They can only use a reasonable amount of force to compel obedience.¹⁰

Seamen of Foreign Vessels.

As a rule, the court will not take jurisdiction in controversies between the seamen of a foreign ship and her master or the ship. Many of the countries have express treaty stipulations giving sole cognizance of these disputes to their consuls. In cases where such a treaty exists, the court will not interfere at all.¹¹

In cases where there is no treaty expressly forbidding

⁹ *Relf v. The Maria*, 1 Pet. Adm. 186, Fed. Cas. No. 11,692. See post, pp. 333, 343.

¹⁰ *U. S. v. Alden*, 1 Spr. 95, Fed. Cas. No. 14,427; *Relf v. The Maria*, 1 Pet. Adm. 186, Fed. Cas. No. 11,692; *Turner's Case*, 1 Ware, 77, Fed. Cas. No. 14,248; *Macomber v. Thompson*, 1 Sumn. 384, Fed. Cas. No. 8,919; *ROBERTSON v. BALDWIN*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715; *Stout v. Weedon* (D. C.) 95 Fed. 1001.

¹¹ *The Montapedia* (D. C.) 14 Fed. 427.

it, the courts have discretion whether to take jurisdiction or not, but they will not take jurisdiction unless under extreme circumstances of cruelty or hardship.¹²

In considering this question, the nationality of the ship governs, and the sailors are all presumed to be of the same nationality as the ship, no matter what may be their actual nationality.¹³

When the court takes jurisdiction under such circumstances, it applies by comity the law of the vessel's flag.¹⁴

MASTER'S RIGHT TO PROCEED IN REM FOR HIS WAGES.

- 11. Under the general admiralty law, the master has no right to proceed in rem for wages. Whether he has when a state statute purports to give it is unsettled.**

The master is not allowed, under the general admiralty law, to proceed against the vessel either for his wages or any disbursements that he may make on her behalf.

One reason assigned for this exception is that the master does not need such a remedy, as he may pay himself out of the freight money. But the difficulty about this is that he does not always have the right to collect it, and, in fact, under modern conditions, very rarely has that right.

A better reason is his relation to the ship. He is the trustee or representative of the owners in distant ports. The law looks to him to protect their interests, and they have the right to assume that he will protect their interests. When a ship herself is sued, process is served upon her alone, or

¹² *THE BELGENLAND*, 114 U. S. 355, 5 Sup. Ct. 830, 29 L. Ed. 152; *The Topsy* (D. C.) 44 Fed. 635.

¹³ *The Heatheraig* (D. C.) 108 Fed. 419; *In re Ross*, 140 U. S. 454, 11 Sup. Ct. 897, 35 L. Ed. 581.

¹⁴ *The Belvidere* (D. C.) 99 Fed. 106.

her master, and not upon her owners. In such case the master is their representative for the very purpose of protecting the ship and safeguarding their interests. Hence, if he were allowed to sue his own vessel, he might confiscate her at the very time when they think he is protecting her, and so he has no right to proceed against the ship which is intrusted to him to protect.¹

It is a more difficult question whether a state statute can give a master a right of action against the ship. In the Raleigh Case, just cited, Judge Hughes held that it could not. The general principle as to the effect of state statutes is that, if a contract is maritime in its nature, a state statute can add to it the additional remedy of a lien, and the federal courts will enforce it. Hence, if the claim of the master is maritime under the principles of general admiralty law, it would seem that a state statute could add to the right which he would then have to sue in personam the additional right of proceeding against the vessel in rem. There is some wavering on the question whether he can proceed even in personam.² But the trend of modern authority is in favor of holding, at least, that the contract is maritime, which would give him the right to proceed in personam.

In the case of *The Mary Gratwick*,³ where a statute of California purported to give the master a lien, Judge Hoffman held that his contract was maritime, and that, therefore, the statute could give the right of procedure in rem.

The fact that the contract is maritime would seem to be settled by the case of *The William M. Hoag*.⁴ There a master had proceeded against a vessel under a statute of

§ 11. ¹ *The Raleigh*, 2 Hughes, 44, Fed. Cas. No. 11,539; *The Grand Turk*, 1 Paine, 73, Fed. Cas. No. 5,683.

² *The Grand Turk*, 1 Paine, 73, Fed. Cas. No. 5,683; *Hammond v. Insurance Co.*, 4 Mason, 196, Fed. Cas. No. 6,001.

³ Fed. Cas. No. 17,591.

⁴ 168 U. S. 443, 18 Sup. Ct. 114, 42 L. Ed. 537.

Oregon purporting to give him the lien. District Judge Bellinger had held that he was entitled to hold the vessel.⁵ Thereupon an appeal was taken direct to the supreme court under the clause of the appellate court act giving such appeal on questions of jurisdiction. It was contended that whether the master had a lien for his wages was a question of jurisdiction. The case was heard along with that of *The Resolute*.⁶ Mr. Justice Brown therefore found it necessary to discuss exactly what constitutes jurisdiction. He held that: "Jurisdiction is the power to adjudicate a cause upon the merits, and dispose of it as justice may require. As applied to a suit in rem for a breach of a maritime contract, it presupposes—First, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court. These are the only requirements to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits." The opinion of the supreme court, therefore, settles that the contract is maritime, which required an affirmance of the decree of the district court without passing upon the question whether the state statute could create the additional lien.

Under the principles laid down in *THE J. E. RUMBELL*,⁷ it seems that state statutes could have this effect, though in that case the question whether it could have such an effect as to a claim of the master for wages was expressly reserved. In fact, these two cases show that the supreme court is evidently reluctant to sustain such a lien, on account of the inconvenience and abuses to which it may give rise.

⁵ (D. C.) 69 Fed. 742.

⁶ 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533.

⁷ 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

PILOTAGE.

12. A pilot is a person who, in consequence of his special knowledge of the waters, has charge of the steering of a vessel.
13. State pilot laws are constitutional.
14. The skill required of a pilot is the ordinary care of an expert in his profession.
15. When in charge of navigation, he supersedes the master.
16. Under the American decisions the vessel is liable for his negligence, even though he is a compulsory pilot.
17. He is liable for negligence.
18. Whether the pilot associations are liable for the acts of a pilot is unsettled.
19. In America admiralty courts have jurisdiction over suits against pilots.

The word "pilot" is used in admiralty in reference to two classes. A pilot may be a regular member of the crew, or he may be taken aboard simply to conduct a vessel in or out of port. The nature of his duties is in each case about the same. He is supposed to know specially the waters through which the vessel navigates, and to conduct her safely through them. The importance of his duties, therefore, is only second to that of the master. In fact, the courts have frequently looked upon him as practically charged with the same responsibility as the master.

Validity of State Pilot Laws.

Most of the states bordering on navigable waters have passed laws regulating the business of pilotage, and rendering it obligatory upon a vessel to take a pilot, or pay the

pilotage fees, even though the master of the vessel may himself be familiar with the waters, and not need assistance in taking his ship to port. The compulsory nature of these laws has been often criticized, though they would seem to be based upon reasons of sound public policy. Unless pilotage is compulsory, the occupation would not be sufficiently remunerative to induce men of skill and character to engage in it. It is like those other numerous kinds of expenses in modern business where people must pay even when no direct service is rendered, in order to support a class of men who can render that service best. It is similar to the payment of taxes in order to support police and fire departments even though the individuals who pay them may never be robbed or have their houses burned; for a moment may come when any one of them may need such protection.

In the case of *COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA* ¹ the court says: "Like other laws, they are framed to meet the most usual cases,—*quæ frequentius accidunt*. They rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer

of pilotage service one of those cases; and we cannot pronounce a law which does this to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage as to be deemed for this cause a covert attempt to legislate upon another subject under the appearance of legislating on this one."

In the case of *The China* ² the court said: "It is necessary that both outward and inward bound vessels of the classes designated in the statute should have pilots possessing full knowledge of the pilot grounds over which they are to be conducted. The statute seeks to supply this want, and to prevent, as far as possible, the evils likely to follow from ignorance or mistake as to the qualifications of those to be employed, by providing a body of trained and skillful seamen, at all times ready for the service, holding out to them sufficient inducements to prepare themselves for the discharge of their duties, and to pursue a business attended with so much of peril and hardship."

These pilotage laws are among the state statutes relating to vessels which have been upheld as not in conflict with the clause of the federal constitution conferring on congress the exclusive right to regulate interstate and foreign commerce.³ The theory of these decisions is that such laws affect commerce incidentally, and are valid until congress legislates on the subject. As soon as congress does legislate, all state provisions in conflict with such legislation are superseded.

The leading case on the subject is *COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA*.

² 7 Wall. 53, 19 L. Ed. 67.

³ Article 1, § 8, cl. 3.

⁴ 12 How. 299, 13 L. Ed. 996. See, also, *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624; *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234; *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115.

Skill Required of Pilot.

Since a pilot hires himself out as an expert, and is employed because he is an expert, the measure of care required of him is a high one. Some of the cases go so far as to say that his liability is as great as that of a common carrier, but the contract of pilotage is, after all, one of mere hiring, and it would seem that the duty required of him is simply the ordinary care required of any servant. This ordinary care, however, as is well known, varies with the character of the employment, so that the ordinary care required of an expert is much higher than the ordinary care required of a simple driver of a land vehicle. The pilot's liability is for ordinary care, but that means the ordinary care of an expert in his profession. While a pilot is not liable for mere errors of judgment, he is liable for any accident that care and attention and an intelligent knowledge of the locality with which he professes familiarity might prevent. He is supposed to know the currents, the channel, and all special difficulties connected therewith, except unknown and sudden obstructions which he could not find out by intelligent attention. He is supposed to know how to cross the bar, and when it is the proper time to cross it.

In the case of *ATLEE v. UNION PACKET CO.*⁵ the court lays down the following as the knowledge required of a river pilot:

"The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning and the observations of the heavenly bodies, obtained by

⁵ 21 Wall. 389, 22 L. Ed. 619.

the use of proper instruments. It is by these he determines his locality, and is made aware of the dangers of such locality, if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs, or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity—his skilled knowledge—very seriously in the course of a long voyage. He should make a few of the first 'trips,' as they are called, after his return, in company with other pilots more recently familiar with the river.

"It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control,—for in this they are absolute masters,—the high compensation they receive, and the care which congress has taken to secure by rigid and frequent examinations and renewal licenses this very class of skill, we do not think we fix the standard very high."

In the case of *The Oceanic* ⁶ the court says: "A licensed pilot, who undertakes to take a ship, with sails up, through a channel such as that leading over the bar of the St. Johns river, Fla., should know the channel, its depths, shoals, and the changes thereof, and should be charged with negligence if he fails to skillfully direct the course of the ship, and give proper supervision and direction to the navigation of the tug which is towing her."

Relative Duties of Pilot and Master.

When a pilot comes aboard a vessel, it is often a difficult question to say what are his duties and those of the master in connection with the navigation. No ship is large enough for two captains. It may be said, in general, that the pilot has charge of the navigation, including the course to steer, the time, place, and method of anchorage, and, in general, the handling of the ship. The master must not interfere unless the pilot is plainly reckless or incompetent. Then he must take charge himself. In fact, in many cases the pilot is spoken of as the temporary master. On their relative duties the supreme court says: ⁷ "Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master, charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged." ⁸

⁶ 20 C. C. A. 574, 74 Fed. 642. See, also, *The Saluda*, Fed. Cas. No. 17,232; *SIDERACUDI v. MAPES* (D. C.) 3 Fed. 873; *The Tom Lysle* (D. C.) 48 Fed. 690; *WILSON v. ASSOCIATION* (D. C.) 55 Fed. 1000; *Id.*, 57 Fed. 229.

⁷ *COOLEY v. BOARD*, 12 How., at page 316, and 13 L. Ed., at page 1003.

⁸ See, also, *The Oregon*, 158 U. S. 194, 195, 15 Sup. Ct. 804, 39 L. Ed. 943; *THE MARCELLUS*, 1 Cliff. 481, Fed. Cas. No. 2,317; *The Shubert* (D. C.) 45 Fed. 503.

Liability of Vessel for Acts of Pilot.

In one respect the decisions in relation to pilots seem to run counter to all common-law ideas on the subject of agency. It is a principle of the law of agency that the foundation of the principal's responsibility for the acts of his agent is the right of selection and control. Yet the American courts hold that a vessel is responsible to third parties for injuries arising from the negligence of the pilot, even though he came on board against the will of the master, under a state statute of compulsory pilotage.⁹

In this respect the English law is different. By express statute there a vessel is not liable for the acts or defaults of a compulsory pilot.

The reason why the vessel is held liable is that admiralty looks on the vessel itself as a responsible thing, and that under the ancient laws relating to pilots the responsibility was one which attached to the vessel itself, irrespective of ownership, it being thought unjust to require injured third parties to look beyond the offending thing to questions of ownership or control.

A pilot is liable to the vessel for any damage caused by carelessness or negligence.¹⁰

Liability of Association for Acts of Individual Pilot.

Where state pilot laws prevail, it is usual for the pilots to organize into associations, frequently unincorporated. The question whether the association would be liable for the negligence of one of its members is a nice one, and cannot be said to be finally settled. It would depend to some extent upon the character of the association itself. Some of them own no common property, keep no common fund, and the pilots take vessels in rotation, and each pilot takes the fee which he makes. Other associations own pilot boats in common, rent offices, own other property, keep a common

⁹ *The China*, 7 Wall. 53, 19 L. Ed. 67.

¹⁰ *SIDERACUDI v. MAPES* (D. C.) 3 Fed. 873.

fund, pay all expenses, pay all the separate fees collected from vessels into the common fund, and divide the balance remaining among the individual members. On principle it would seem that this ought to constitute a joint liability, and that the different members of such an association ought to be responsible for the acts of an individual pilot. It would seem that all the requisites that concur to make a joint liability would be present in such a case. In fact, it would hardly be putting the case too strongly to call it a partnership.

In *Ward v. Thompson*,¹¹ which was a question as to what constituted a partnership, the court held that community of trade for mutual profit, one of the partners contributing a vessel and the other his skill and experience, and community of profits on a fixed ratio, constituted a partnership.

In the case of *Berthold v. Goldsmith*¹² the question as to what constitutes a partnership was discussed at some length, and there, too, it was held substantially as laid down in the previous case.

In the case of *Strang v. Bradner*,¹³ one of the members of a partnership had made a fraudulent representation amounting to a deceit without the knowledge of his partners, and the proceeds of the notes so obtained had been paid into the partnership accounts, and used in the business. The court held that all the members were responsible for this act of one.

In *Meehan v. Valentine*,¹⁴ the court held that lending money to a partnership under an agreement that interest, and also a part of the profits, should be paid, did not constitute the lender a partner; but in discussing it the court

¹¹ 22 How. 330, 16 L. Ed. 249.

¹² 24 How. 536, 16 L. Ed. 762.

¹³ 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248.

¹⁴ 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835. See, also, *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, 7 Sup. Ct. 1278, 30 L. Ed. 1137.

said ¹⁶ that "those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions."

In *Moreton v. Hardern*,¹⁶ one of three proprietors of a stagecoach injured a person by negligent driving. The court held that all three were responsible in damages.

In the case of *Sagers v. Nuckolls*,¹⁷ the court held that all the members of a partnership were responsible for the death of a person caused by the negligence of one.

Under the general principles relating to joint liability it would seem, therefore, that an association of the character above described ought to be liable for the acts of its individual members. The case, however, has not been definitely adjudicated.

In *Mason v. Ervine*,¹⁸ Judge Pardee, as circuit judge, held that the Louisiana Pilots Association was not liable for the act of one of its members. This case would seem rather to have turned upon the special language of the Louisiana Code than upon the general principle, for the report itself does not show the provisions or character of their association. In any event, the question was not necessary for the decision of the case, as he held that the pilot himself was not guilty of any negligence, which of itself was sufficient to dispose of the case.

In *The City of Reading*,¹⁹ District Judge McPherson held that the Delaware River Pilots Association was not responsible for the negligence of one of its members. The report

¹⁶ Page 623, 145 U. S., page 975, 12 Sup. Ct., and page 841, 36 L. Ed.

¹⁶ 4 Barn. & C. (10 E. C. L. 553) 223.

¹⁷ 3 Colo. App. 95, 32 Pac. 187.

¹⁸ (C. C.) 27 Fed. 459.

¹⁹ (D. C.) 103 Fed. 696, affirmed, *The City of Dundee* (C. C. A.) 108 Fed. 679, as to nonliability of association, reserving question as to liability of ship for act of pilot.

does not fully show the character of that association, but it would seem to be a mere association for benevolent purposes, and that even the pilot fees were not paid into a common treasury. He held in the same case that a steamship was not liable for the act of a pilot in anchoring her at an improper place, and not anchoring her in the regular anchorage grounds designated by the port wardens. In this respect, at least, the case would seem to be in conflict with *The China* decision, above referred to. It would seem, therefore, that these two decisions do not change the general rule of liability, and that under that rule an association of pilots who hold property in common, used in a common business, and have a common treasury, would be responsible for the acts of its different members.

Remedies for Pilotage.

A pilot may proceed in rem against the vessel for his fees, even though they are merely for a tender of service which the vessel refuses to accept.²⁰

It would seem clear on principle that admiralty has jurisdiction of suits against pilots for negligence. The English decisions, however, are against it.²¹ But their decisions turn upon their special statutes, and upon doctrines not adopted by our courts. There are many such cases in our reports, though the question of jurisdiction does not seem to have been raised in them.²²

On principle it is difficult to say how the jurisdiction can be denied. It would be difficult to find a transaction more maritime in character than the duties of a pilot. His right to proceed in rem is thoroughly settled, and the right to pro-

²⁰ *The Alzena* (D. C.) 14 Fed. 174.

²¹ *The Alexandria*, L. R. 3 Adm. & Ecc. 574; *Flower v. Bradley*, 44 Law J. Exch. 1.

²² *The Urania*, 10 Wkly. Rep. 97. See, as illustrations, *SIDERA-CUDI v. MAPES* (D. C.) 3 Fed. 873; *WILSON v. ASSOCIATION* (D. C.) 55 Fed. 1000; *Id.*, 57 Fed. 227.

ceed against him ought certainly to be as maritime as his right to seize the vessel.

As will be seen in a future connection, the test of a maritime tort is simply that it is a tort occurring on maritime waters. The act of a pilot in injuring a vessel by his negligence certainly measures up to this test. Therefore there ought to be no question of the right to proceed against him in the admiralty.

CHAPTER III.

OF GENERAL AVERAGE AND MARINE INSURANCE.

20. "General Average" Defined.
21. Requisites of General Average.
22. "Marine Insurance" Defined.
23. Maritime Character of Contracts.
24. Insurable Interest.
25. Conditions in Contracts of Insurance.
26. Misrepresentation and Concealment.
27. Seaworthiness.
28. Deviation.
29. Illegal Traffic.
30. The Policy and its Provisions as to Risk and Perils Insured Against.
31. Perils of the Seas.
32. Barratry.
33. Thefts.
34. All Other Perils.
35. Proximate Cause of Loss.
36. The Loss—Total or Partial.
37. Actual or Constructive.
38. Abandonment.
39. Agreed Valuation.
40. Subrogation of Insurer.
41. Suing and Laboring Clause.

"GENERAL AVERAGE" DEFINED.

20. General average is the principle of law which requires that the parties interested in a marine venture shall contribute to make up the loss of the sufferer when there is a voluntary sacrifice of part of the venture made by the master, as representative of all concerned, for the benefit of all.

Antiquity and Nature.

This is one of the earliest known subjects of maritime law. It can be traced back through the Roman law to the Rhodian law, which prevailed before Lycurgus laid the foundations of Spartan, or Solon of Athenian, greatness.

"Lege Rhodia cavetur ut si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est."

If, in a storm at sea, the ship must be lightened in order to save her and her contents, and a part of the cargo is thrown overboard for the purpose, the ship, her freight money, and the remaining cargo must contribute to indemnify the owner of the goods sacrificed; in other words, the ship and entire cargo are looked upon as a single maritime venture, and the loss is averaged on all. This instance of general average by the throwing of goods overboard, or by throwing over parts of the ship for the same purpose, like anchors, boats, masts, etc., is called "jettison."¹ But there are many other forms. Suppose, for example, a master, for the common safety of all interests, voluntarily strands his vessel. The salvage for getting her off would be a subject of general average, as also her value, in case she was not saved, but the cargo was saved.²

Stranding.

Some of the most difficult questions of general average arise when the question is whether the stranding is voluntary, which would be a case of general average, or involuntary, which would be a peril of the sea, to be borne by the party who suffers from it. A notable case on this subject is *Barnard v. Adams*,³ which was a case where a ship that had broken from her moorings in a storm was stranded

§ 20. ¹ *Montgomery v. Insurance Co.* [1901] Prob. Div. 147.

² *Columbian Ins. Co. v. Ashby*, 13 Pet. 331, 10 L. Ed. 186.

³ 10 How. 270, 13 L. Ed. 417.

intentionally by the master in such a way that the cargo could be saved.

In *THE STAR OF HOPE*,⁴ fire was discovered upon a vessel, in consequence of which she made sail for the Bay of San Antonio, which was the easiest port to reach. On arrival there she waited some time for a pilot to guide her into the bay, but none came, and, the fire increasing, and destruction being inevitable if he remained outside, the master endeavored to take her in himself, having in his mind the risk of grounding in the attempt. In doing so she struck upon a reef accidentally. The court held that it was a case for general average, even though the master did not run her upon that special reef intentionally; as he intentionally took the chance of grounding in making harbor, and by his act a large portion of the common venture was saved.

On the other hand, in the case of *The Major William H. Tatum*,⁵ where the vessel grounded without the master's intending to do so, and in no better place than if he had not slipped her cable, and with no benefit in the final result, it was held that general average could not be enforced, the master's main motive being to save life.

REQUISITES OF GENERAL AVERAGE.

21. To give the right to claim a general average contribution, the sacrifice

- (a) **Must be voluntary, and for the benefit of all.**
- (b) **Must be made by the master, or by his authority**
- (c) **Must not be caused by any fault of the party asking the contribution.**
- (d) **Must be successful.**
- (e) **Must be necessary.**

⁴ 9 Wall. 203, 19 L. Ed. 638.

⁵ 1 C. C. A. 236, 49 Fed. 252.

The Sacrifice must be Voluntary, and for the Benefit of All.

If a mast is carried away by a storm, that is a peril of the sea,—one of the risks which the ship carries, and which she cannot ask any other interest to aid her in bearing. If, in consequence of a storm, and without negligence on the part of the ship or her crew, water reaches the cargo, and injures it, that must be borne by that part of the cargo alone which is injured. There is nothing voluntary about either of these cases. If a ship springs a leak at sea, and puts into port, and has to unload and afterwards reshipe the cargo, the expenses of repairing the leak must be borne by the ship, and cannot be charged as average.¹ Such a charge would be for the benefit of the ship alone, not for the benefit of all. In such case the expense of handling the cargo would not come into the average under the English decisions, but would under the American.²

On the same principle, flooding the compartments of a vessel, with the result of diminishing the damage to the cargo, may be the subject of general average.³

In the case of *Anglo-Argentine Live-Stock & Produce Agency v. Temperley Shipping Co.*,⁴ there was a deck cargo of live stock to be carried from Buenos Ayres to Deptford under a contract which required that the ship should not call at any Brazilian port before landing her live stock, the reason being that, if she did, the cattle could not be landed in the United Kingdom. After sailing, the ship sprang a leak, and the master, for the safety of all concerned, put back to Bahia. Consequently the cattle could not be landed in England, and had to be sold elsewhere at a loss. It was held that this loss was a proper subject of general average.

§ 21. ¹ *Svendsen v. Wallace*, 10 App. Cas. 404.

² *THE STAR OF HOPE*, 9 Wall. 203, 19 L. Ed. 638; *Hobson v. Lord*, 92 U. S. 397, 23 L. Ed. 613.

³ *The Wordsworth* (D. C.) 88 Fed. 313.

⁴ [1899] 2 Q. B. 403.

In *Iredale v. China Traders' Ins. Co.*,⁵ a cargo of coal on a voyage from Cardiff to Esquimaux became heated, so that the master had to put into a port of refuge, and land the coal. On landing, a survey was held upon it, and it was found to be worthless. Thereupon the voyage was abandoned, and the freight was lost. The vessel owner claimed that under these circumstances freight should be the subject of general average, but the court held otherwise, as the coal had really become worthless, not from any act of the master in going into port, but from internal causes, and therefore it was not a voluntary sacrifice.

It must be Made by the Master, or by his Authority.

The powers of the captain of a ship are necessarily very extended. His owners may be scattered, or inaccessible. He may not even know who are the owners of the cargo. His voyage may extend around the globe, where communication is impossible. Hence he has, ex necessitate rei, powers unknown to any other agent. He can bind the ship and owners for necessary funds to complete the voyage. He can often sell part of the cargo to raise funds for the same purpose. He can give bottomry or respondentia bonds with the same object.

But he alone has such powers, and his right to incur a general average charge is limited to his own ship and her own cargo.

In *The J. P. Donaldson*,⁶ the master of a tug, which had a tow of barges, voluntarily cast them off in a storm to save his tug. The owners of the barges libeled the tug for an average contribution, the tug having been saved, and the barges lost. The court held that it was not a case for general average, as the barges did not occupy the relation to the tug which the cargo occupies to a ship, and the master

⁵ [1899] 2 Q. B. 356; Id. [1900] 2 Q. B. 515.

⁶ 167 U. S. 599, 17 Sup. Ct. 951, 42 L. Ed. 292.

of the tug did not hold to them the relation which the master of a ship holds to her cargo.

In the case of *RALLI v. TROOP*,⁷ a ship which had caught on fire was scuttled by the municipal authorities of the port, and became a total loss; but it resulted in saving the cargo. The court held that the loss of the ship could not be charged against the cargo in general average, for the reason that it was the act of strangers, and not of the master. The learned opinion of Mr. Justice Gray in this case may be specially recommended as an epitome of our law on the subject. He summarizes his conclusions thus:

“The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only.

“To constitute a general average loss, there must be a voluntary sacrifice of part of a maritime venture, for the purpose, and with the effect, of saving the other parts of the adventure from an imminent peril impending over the whole.

“The interests so saved must be the sole object of the sacrifice, and those interests only can be required to contribute to the loss. The safety of property not included in the common adventure can neither be an object of the sacrifice nor a ground of contribution.

“As the sacrifice must be for the benefit of the common adventure, and of that adventure only, so it must be made by some one specially charged with the control and the safety of that adventure, and not be caused by the compulsory act of others, whether private persons or public authorities.

“The sacrifice, therefore, whether of ship or cargo, must be by the will or act of its owner, or of the master of the ship, or other person charged with the control and protection of the common adventure, and representing and acting

⁷ 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742.

for all the interests included in that adventure, and those interests only.

"A sacrifice of vessel or cargo by the act of a stranger to the adventure, although authorized by the municipal law to make the sacrifice for the protection of its own interests, or of those of the public, gives no right of contribution, either for or against those outside interests, or even as between the parties to the common adventure.

"The port authorities are strangers to the maritime adventure, and to all the interests included therein. They are in no sense the agents or representatives of the parties to that adventure, either by reason of any implied contract between those parties, or of any power conferred by law over the adventure as such.

"They have no special authority or special duty in regard to the preservation or the destruction of any vessel and her cargo, as distinct from the general authority and the general duty appertaining to them as guardians of the port, and of all the property, on land or water, within their jurisdiction.

"Their right and duty to preserve or destroy property, as necessity may demand, to prevent the spreading of a fire, is derived from the municipal law, and not from the law of the sea.

"Their sole office and paramount duty, and, it must be presumed, their motive and purpose, in destroying ship or cargo in order to put out a fire, are not to save the rest of a single maritime adventure, or to benefit private individuals engaged in that adventure, but to protect and preserve all the shipping and property in the port for the benefit of the public.

"In the execution of this office, and in the performance of this duty, they act under their official responsibility to the public, and are not subject to be controlled by the **owners of the adventure**, or by the master of the vessel as their representative.

"In fine, the destruction of the J. W. Parker by the act of the municipal authorities of the port of Calcutta was not a voluntary sacrifice of part of a maritime adventure for the safety of the rest of that adventure, made, according to the maritime law, by the owners of vessel or cargo, or by the master as the agent and representative of both. But it was a compulsory sacrifice, made by the paramount authority of public officers deriving their powers from the municipal law, and the municipal law only; and therefore neither gave any right of action, or of contribution, against the owners of property benefited by the sacrifice, but not included in the maritime adventure, nor yet any right of contribution as between the owners of the different interests included in that adventure."

But, if the scuttling was done at the request of the master, the loss would be the subject of general average.⁸

*It must not be Caused by any Fault.*⁹

For instance, it is implied in all contracts of shipment that the vessel shall be seaworthy.¹⁰ If a voluntary sacrifice is rendered necessary by a breach of this warranty, the vessel, so far from being entitled to recover in general average, can be held liable for any injury to the cargo caused thereby.¹¹ For the same reason, cargo carried on deck, of a character not customarily carried on deck, cannot claim the benefit of general average.¹²

⁸ The Roanoke, 8 C. C. A. 67, 59 Fed. 161.

⁹ Heye v. North German Lloyd (D. C.) 33 Fed. 60; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130.

¹⁰ The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

¹¹ The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; Pacific Mail S. S. Co. v. Mining Co., 20 C. C. A. 349, 74 Fed. 564; Snow v. Perkins (D. C.) 39 Fed. 334.

¹² The Hettie Ellis (C. C.) 20 Fed. 507; The John H. Cannon (D. C.) 51 Fed. 46; Wood v. Insurance Co. (D. C.) 1 Fed. 235; Id. (C. C.) 8 Fed. 27.

It must be Successful.

The foundation of the claim is that it is for the benefit of all. If they are not benefitted thereby, there is no equitable claim upon them.

It must be Necessary.

This almost goes without saying. The master is vested with a large discretion as to its necessity, and the courts are inclined to uphold that discretion.¹³

Remedies to Enforce Contribution.

In practice, when a master has had a disaster, he comes into port for the purpose of repairs, and employs an average adjuster to make up a statement, pick out such items as are properly chargeable in general average, and apportion them among the several interests. The master is entitled to hold the cargo until this is done, or until its owners give average bonds conditioned to pay their respective proportions.

At first there was some question whether admiralty had jurisdiction over suits to compel the payment of such proportion. But it is now settled that the master has a lien upon the cargo to enforce their payment, that such lien may be asserted in an admiralty court, and that suits on average bonds are also sustainable in admiralty.¹⁴

"MARINE INSURANCE" DEFINED.

22. Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freight, or other insurable interest in such property may be exposed during a certain voyage or a fixed period of time.

¹³ *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58.

¹⁴ *Dupont de Nemours v. Vance*, 19 How. 162, 15 L. Ed. 581; *The San Fernando* (C. C.) 12 Fed. 341. On this general subject, see, also, 1 Pars. Shipw. & Adm. 238-478.

23. MARITIME CHARACTER OF CONTRACTS—

Such contracts are cognizable in the admiralty, but are not so connected with the ship as to give a proceeding against the ship herself for unpaid premiums.

Marine insurance is of great antiquity, and is recognized as within the jurisdiction of the admiralty courts by the leading continental courts and authorities. In America it was so held by Mr. Justice Story in the great case of *DE LOVIO v. BOIT*,¹ and was definitely settled by the decision of the supreme court in the case of *New England Mut. Marine Ins. Co. v. Dunham*.² But, while such contracts are maritime, the distinction heretofore drawn still prevails, as mere preliminary contracts for insurance, or suits to reform a policy not in accordance with the preliminary contract, are not maritime.³ Though insurance contracts are maritime, a claim for unpaid premiums can only be asserted against the party taking out the insurance, and cannot be made the basis of a proceeding in rem against the vessel insured.⁴

The reason of this is that insurance is really for the benefit of the owner alone. It does not in any way benefit the vessel as a vessel. It does not render her more competent to perform her voyage, or aid her to fulfill the purpose of her creation.

INSURABLE INTEREST.**24. The party effecting marine insurance must be so situated with regard to the thing insured as to expect pecuniary benefit from its**

§§ 22-23. ¹ Fed. Cas. No. 3,776.

² 11 Wall. 1, 20 L. Ed. 90.

³ *Andrews v. Insurance Co.*, 3 Mason, 6, Fed. Cas. No. 374; *Marquardt v. French* (D. C.) 53 Fed. 603.

⁴ *The Daisy Day* (C. C.) 40 Fed. 603; *The Hope* (D. C.) 49 Fed. 279.

safety, or pecuniary loss from its destruction.

This does not necessarily mean that he must have an insurable interest at the time of effecting the policy. He must have it, however, at the time of the loss. For instance, it is frequently the case that vessels whose whereabouts are unknown may be insured "lost or not lost," and this insurance is valid even though at the time it is effected it may turn out that the vessel has been totally lost. In the case of *HOOPER v. ROBINSON*,¹ the court quotes with approval a paragraph from Arnould's Insurance, which says that the insurable interest subsisting during the risk and at the time of loss is sufficient, and the assured need not allege or prove that he was interested at the time of effecting the policy. The court also says that where the insurance is "lost or not lost" the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract is valid, for it is a stipulation for indemnity against past as well as future losses, and the law upholds it. In the same case the court says: "A right of property in a thing is not always indispensable to the insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy."

In the case of *Buck v. Chesapeake Ins. Co.*,² the supreme court says that interest does not mean property.

A contract of marine insurance, like other contracts of insurance, is a mere contract of indemnity, and hence it follows that the party taking out the insurance can only claim indemnity for his actual loss, and cannot make a wager policy. An absolute title or property is not necessary

§ 24. 198 U. S. 528, 25 L. Ed. 219. See, also, *Woodside v. Insurance Office* (D. C.) 84 Fed. 283; *Canton Ins. Office v. Woodside*, 33 C. C. A. 63, 90 Fed. 301.

* 1 Pet. 151, 7 L. Ed. 90.

for the validity of such insurance. For instance, in the case of *China Mut. Ins. Co. v. Ward*,³ it was held that advances by a ship's husband, accompanied by no lien, but constituting a mere personal debt of the shipowner, were not such an interest in property as gave him an insurable interest. On the other hand, in the case of *The Gulnare*,⁴ an agent who was operating a vessel on commission, with an actual pledge of the vessel as security, was held to have an insurable interest.

In the case of *Merchants' Mut. Ins. Co. v. Baring*,⁵ it was held that advances of money for the benefit of the ship which had attached to them a lien upon the ship for their repayment gave an insurable interest.

As it is possible thus to insure not simply the entire property, but different interests in the property, it follows that different parties may insure different interests in the same property without its constituting double insurance.

In the case of *International Nav. Co. v. Insurance Co. of North America*,⁶ it was held that a policy on disbursements, which covered many subjects connected with the use of the ship as well as any interest in the ship not covered by insurance, which was against total loss only, was not double insurance with the policy on the ship herself covering partial as well as total loss. The subject-matter of the insurance was entirely different.

In the case of *St. Paul Fire & Marine Ins. Co. v. Knickerbocker Steam Towage Co.*,⁷ a marine policy permitting the tug to navigate certain waters provided that, while she

³ 8 C. C. A. 229, 59 Fed. 712. See, also, *Seagrave v. Insurance Co.*, L. R. 1 C. P. 305.

⁴ (C. C.) 42 Fed. 861.

⁵ 20 Wall. 159, 22 L. Ed. 250. See, also, *The Fern Holme* (D. C.) 46 Fed. 119; *Providence Washington Ins. Co. v. Bowring*, 1 C. C. A. 683, 50 Fed. 613.

⁶ (D. C.) 100 Fed. 304.

⁷ 36 C. C. A. 19, 93 Fed. 931.

was out of these waters, the policy should be merely suspended, and should reattach when she returned to such waters. The vessel, intending to go out of these waters, thereupon procured insurance during such deviation. The court held that this was not double insurance, as the two policies necessarily did not overlap.

Where the name of the insured is not given, but general terms, "for whom it may concern," are used, oral proof is admissible to show who are covered by it.

Where the policy names the party covered, the presumption is that he has an insurable interest, as the issue of the policy would be *prima facie* evidence of that fact, and it would be upon the insurance company to prove the contrary.⁸

The insurable interest of a vessel owner in a ship covered by a bottomry bond is simply the excess of the ship's value over the bottomry bond. As this bond is not payable in the event of a total loss of the vessel, that portion of the vessel's value is not at risk, as far as the owner is concerned, but the holder of the bottomry bond carries that risk; hence the only risk carried by the owner in such case is the excess over the value of the bond.⁹

CONDITIONS IN CONTRACTS OF INSURANCE.

25. CONTRACTS OF MARINE INSURANCE ARE SUBJECT TO CERTAIN CONDITIONS, express or implied, a breach of which avoids the contract.

26. MISREPRESENTATION AND CONCEALMENT—Any misrepresentation or conceal-

⁸ *Nantes v. Thompson*, 2 East, 386.

⁹ *Delaware Mut. Safety Ins. Co. v. Gossler*, 96 U. S. 645, 24 L. Ed. 863.

ment of a material fact, or any breach of warranty of any fact, will avoid the policy.

The law on the subject of representations in insurance policies may be said to be generally the same as in any other contract. Any representation of a material fact, or a fact which would influence the judgment of a prudent underwriter, as to taking the risk or assessing the premium, must be substantially true, and every fact of this sort which is within the knowledge of the assured, and not in the knowledge of the underwriter, must be stated. The courts, perhaps, have been a little stricter in reference to marine insurance policies than other contracts, on account of the peculiar nature of the business. A few cases may illustrate the doctrine more plainly.

In *Hazard v. New England Ins. Co.*,¹ the vessel was represented as a coppered ship. At the time she was in the port of New York, and the party applying for the insurance wrote from there to Boston to get it. The expression had different meanings in New York and Boston. The court held that the New York meaning was to be taken. If the representation had not come up to that meaning, the policy would undoubtedly have been void.

In the same case it was held that an underwriter is presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade, and the political conditions of foreign nations; and that, therefore, such matters of common knowledge as this need not be expressly stated.

In the case of *Buck v. Chesapeake Ins. Co.*,² which was a policy "for whom it might concern," the court held that it was not incumbent upon the party taking out the insurance to state who were interested in it, unless the question

§§ 25-26. 18 Pet. 557, 8 L. Ed. 1043.

² 1 Pet. 151, 7 L. Ed. 90.

was asked, but the questions asked must be answered truthfully.

The case of *SUN MUT. INS. CO. v. OCEAN INS. CO.*^{*} was a reinsurance case, where a company which had insured a vessel on certain voyages reinsured the risk in another company. They failed to state, in the information which they gave the second company for reinsurance, the existence of an important charter, of which they knew, and of which the second company did not know. The policy was held void. The court said: "It thus appears that at the time of the loss Melcher had insurance on two concurrent charters and his primage thereon during one voyage, being insured, besides his interest in the ship, on double the amount of its possible earnings of freight for one voyage. This fact was known to the Ocean Company at the time, and was not communicated by it to the Sun Company, which was without other knowledge upon the subject, and executed its policy to the Ocean Company in ignorance of it.

"That knowledge of the circumstance was material and important to the underwriter, as likely to influence his judgment in accepting the risk, we think is so manifest to common reason as to need no proof of usage or opinion among those engaged in the business. It was a flagrant case of overinsurance upon its face, and made it the pecuniary interest of the master in charge of the ship to forego and neglect the duty which he owed to all interested in her safety. Had it been known, it is reasonable to believe that a prudent underwriter would not have accepted the proposal as made, and, where the fact of the contract is in dispute, as here, it corroborates the denial of the appellants. The concealment, whether intentional or inadvertent, we have no hesitation in saying, avoids the policy, if actually intended to cover the risk for which the claim is made.

"In respect to the duty of disclosing all material facts,

^{*} 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

the case of reinsurance does not differ from that of an original insurance. The obligation in both cases is one *uberrimæ fidei*. The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment, even where there is no design to deceive. The exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance. In the former, the party seeking to shift the risk he has taken is bound to communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter; while in the latter the party, in the language of Bronson, J., in the case of *New York Bowery Fire Ins. Co. v. Insurance Co.*, 17 Wend. (N. Y.) 359, 367, is 'not bound, nor could it be expected that he should speak evil of himself.'

"Mr. Duer (2 Ins. 398, Lect. 13, pt. 1, § 13) states as a part of the rule the following proposition:

"'Sec. 13. The assured will not be allowed to protect himself against the charge of an undue concealment by evidence that he had disclosed to the underwriters, in general terms, the information that he possessed. Where his own information is specific, it must be communicated in the terms in which it was received. General terms may include the truth, but may fail to convey it with its proper force, and in all its extent. Nor will the assured be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information. It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks; and, when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influ-

enced the terms of the insurance, the concealment vitiates the policy.'"

If the concealment of facts is by the agent of the insured, even though the insured did not know it, the policy is avoided, for the agent had the opportunity to communicate the facts, and did not.⁴

In England it is the practice to have a preliminary binder before the issuing of the main policy, and the initialing of this by the parties is treated by them as morally binding, although it is unenforceable as a contract for want of a stamp.

In the case of *Cory v. Patton*,⁵ after this preliminary contract was made, but before the policy was issued, certain material facts came to the knowledge of the agent of the insured; the fact so coming to his knowledge being the very material fact that the ship had been lost. The court held, however, that it was not incumbent upon the insured to communicate this fact, even though the preliminary contract was not binding, and the policy had not been issued, because he had given all the material facts up to the time of the preliminary contract, and they would not tempt the underwriter to repudiate an obligation treated as a moral one by those in the business.

A leading case on this general subject is that of *IONIDES v. PENDER*.⁶ There the assured greatly overvalued the goods without disclosing the real valuation to the underwriter, and it was shown that the question of valuation is, among underwriters, a very material consideration. The court held that this misrepresentation vitiated the policy.

The general doctrine that a warranty, even of an immaterial matter, if broken, avoids the policy, is well settled.⁷

⁴ *McLanahan v. Insurance Co.*, 1 Pet. 171, 7 L. Ed. 98.

⁵ L. R. 9 Q. B. 577. The case of *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246, can hardly be considered in conflict with this.

⁶ L. R. 9 Q. B. 531.

⁷ 1 Pars. Ins. 337.

SAME—SEAWORTHINESS.

27. It is an implied condition of marine insurance on vessel, cargo, or freight that the vessel shall be seaworthy, which means that she must be sufficiently tight, stanch, and strong to resist the ordinary attacks of wind and sea during the voyage for which she is insured, and that she must be properly manned and equipped for the voyage.

The question what constitutes seaworthiness is, necessarily, a very variable one. A vessel which is seaworthy for river navigation may not be for bay navigation, and a vessel which is seaworthy for bay navigation may not be for ocean navigation. Hence the seaworthiness implied means seaworthiness for the voyage insured. It applies not only to the hull of the vessel, but to her outfit, including her crew. She must be properly fitted out for the voyage which she is to undertake, and she must have a sufficient and competent crew.

In *Pope v. Swiss Lloyd Ins. Co.*,¹ it was held that a vessel with insufficient ground tackle to hold her against ordinary incidents of navigation, including ordinarily heavy weather, was not seaworthy.

In the case of *RICHELIEU & O. NAV. CO. v. BOSTON MARINE INS. CO.*,² it was held that a vessel whose compass was defective, though not known to be so, was unseaworthy; for it is implied not merely that the vessel owner will use ordinary care to keep his vessel seaworthy, but that she actually is seaworthy.

In the case of *The Niagara* ³ (which was a suit by a

§ 27. ¹ (D. C.) 4 Fed. 153.

² 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

³ 21 How. 7, 16 L. Ed. 41.

shipper, not an insurance case, but which applies on this point) the court says: "A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number, and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place, temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence."

In the case of *STEEL v. STATE LINE S. S. CO.*,⁴ Lord Cairns defines seaworthiness as follows:

"I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is, at the time of its departure, reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By 'seaworthy,' my lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic. * * *

⁴ 3 App. Cas. 72. See, also, *Bullard v. Insurance Co.*, 1 Curt. 148, Fed. Cas. No. 2,122.

"But, my lords, if that is so, it must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle, I think there can be no doubt that this would be the meaning of the contract; but it appears to me that the question is really concluded by authority. It is sufficient to refer to the case of *Lyon v. Mells*,* in the court of queen's bench during the time of Lord Ellenborough, and to the very strong and extremely well considered expression of the law which fell from the late Lord Wensleydale when he was a judge of the court of exchequer, and was advising your lordship's house in the case of *Gibson v. Small*.†"

As a general rule, the burden of proving unseaworthiness is on the underwriter.⁵

But where a vessel which has been exposed to no unusual peril suddenly develops a leak within a short time, this may raise a presumption of unseaworthiness, and the burden may shift to the assured.⁶ In reference to this Judge Curtis says:

"But, as I have already indicated, the presumption is that this brig was seaworthy, and the burden of proof is on the underwriters by some sufficient evidence to remove this presumption. This may be done either by proving the existence of defects amounting to unseaworthiness before she sailed, or that she broke down during the voyage, not having encountered any extraordinary action of the winds or waves, or any other peril of the sea sufficient to produce such effect upon a seaworthy vessel, or by showing that an examination during the voyage disclosed such a state of decay and weakness as amounted to unseaworthiness, for

* 5 East. 428.

† 4 H. L. Cas. 353.

⁵ *Batchelder v. Insurance Co.* (D. C.) 30 Fed. 459; *Pickup v. Insurance Co.*, 3 Q. B. Div. 594.

⁶ *Bullard v. Insurance Co.*, 1 Curt. 148, Fed. Cas. No. 2,122. See, also, *Moore v. Underwriters* (C. C.) 14 Fed. 226. *Anderson v. Morice*, L. R. 10 C. P. 609; *Ajum v. Insurance Co.* [1901] App. Cas. 362.

which the lapse of time and the occurrences of the voyage would not account. * * *

"There is such a standard, necessarily expressed in general terms, but capable of being applied, by an intelligent jury, to the proofs in the cause. The hull of the vessel must be so tight, stanch, and strong as to be competent to resist the ordinary attacks of wind and sea during the voyage for which she is insured. You will apply that standard to this case."

This warranty of seaworthiness applies at the commencement of the voyage. A vessel may be in port, and require extensive repairs, but, if these repairs are made before she sails, so as to make her seaworthy at sailing, she fulfills what is required of her.⁷

This condition always applies to insurance under voyage policies. As to time policies, there is quite a difference between English and American decisions. Under the American decisions a vessel, when insured by a time policy, must be seaworthy at the commencement of the risk. If, when so seaworthy, she sustains damage, and is not refitted at an intermediate port, and a prudent master would have refitted her there, and she is lost in consequence of the failure to refit her, she would be unseaworthy, and the underwriter would not be liable. If, however, she is not refitted, and is lost from some entirely different cause, the underwriters would be liable, even though a prudent master would have had her refitted.⁸

In England, on the other hand, there is no warranty of seaworthiness at all on time policies, either at the commencement of the voyage or at any other time.⁹

This condition only applies to the vessel. There is no

⁷ *McLanahan v. Insurance Co.*, 1 Pet. 171, 184, 7 L. Ed. 98.

⁸ *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497.

⁹ *Dudgeon v. Pembroke*, 2 App. Cas. 284.

implied condition that the cargo shall be fitted to withstand the voyage for which it is insured.¹⁰

SAME—DEVIATION.

28. It is an implied condition of a voyage policy that the vessel will take the course of sailing fixed by commercial custom between two ports, or, if none is fixed, that it will take the course which a master of ordinary skill would adopt. Any departure from such course, or any unreasonable delay in pursuing the voyage, constitutes what is known as a "deviation."

The reason of this implied condition is that such an act on the part of the vessel substitutes a new risk different from the one which the underwriters have assumed, and, after such deviation commences, the insurers are not liable for any loss incurred during the deviation. The cases on this subject are numerous. Whether an act is a deviation depends largely upon the particular language of the policy and the course of trade.

In the case of *HEARNE v. NEW ENGLAND MUT. MARINE INS. CO.*,¹ a vessel was insured to a port in Cuba, and at and thence to a port of advice and discharge in Europe. The vessel went to the port in Cuba, and discharged, and then, instead of sailing direct to Europe, sailed for another port in Cuba to reload, and was lost on her way there. The court held that this constituted a deviation, and released the underwriters, and that, in the face of the express language of the contract, it was not admissible to prove a usage in such voyages to go to two ports in Cuba, one for discharge and another for reloading.

¹⁰ *Koebel v. Saunders*, 17 C. B. N. S. (112 L. C. L.) 71.

§ 28. 120 Wall. 488, 22 L. Ed. 395.

In the case of *Columbian Ins. Co. v. Catlett*,² which was the case of a voyage policy from Alexandria to the West Indies and back, it was held that, as the known usage of the trade allowed delay to accomplish the object of the voyage by selling out the cargo, it was not a deviation to remain for that purpose, provided the time so occupied was not unreasonable.

In the case of *Wood v. Pleasants*,³ it was held that a stoppage on the way for the purpose of taking on water, and only for that purpose, was not a deviation, assuming that the vessel had a proper supply of water at the time of sailing.

In the case of *West v. Columbian Ins. Co.*,⁴ a vessel insured on a voyage to Pernambuco unnecessarily anchored off port, when she might have gone directly in. It was held that this unnecessary delay was such a deviation as discharged the underwriters.

Under the decisions, it is not a deviation for a vessel to delay, or go out of her way, in order to save life at sea. It is, however, a deviation for her to delay, or go out of her way, for the purpose of saving property. Under the special facts of special cases this principle is sometimes difficult to apply, for a vessel in deviating to save life can sometimes best accomplish it by saving property, as, for instance, by taking a disabled vessel in tow. But when, after doing so, the facts are such that the crew can be saved without the property, a continued attempt to save the property is undoubtedly a deviation.

A leading case on this subject is *SCARAMANGA v. STAMP*.⁵ It was a case arising out of a charter party (in which there is also an implied warranty not to deviate),

² 12 Wheat. 383, 6 L. Ed. 664.

³ Fed. Cas. No. 17,961, 3 Wash. C. C. 201.

⁴ Fed. Cas. No. 17,421, 5 Cranch, C. C. 309. See, also, *Martin v. Insurance Co.*, Fed. Cas. No. 9,161, 2 Wash. C. C. 254.

⁵ 4 C. P. Div. 316; Id., 5 C. P. Div. 295.

where a disabled vessel was taken in tow, causing considerable delay to the other vessel. The court held, under the facts, that the delay was unjustifiable, and the insurers were released.

On the other hand, in the case of *Crocker v. Jackson*,⁶ Judge Sprague held that a departure of the vessel from her course in order to ascertain whether those on board a vessel in apparent distress needed relief, and the delay in order to offer such relief, was not a deviation, though such action for the mere purpose of saving property would be. He held, also, that, if both motives existed, it would not be a deviation, and that, if the circumstances were not decisive, or were ambiguous, as to the motives of the master of the salving vessel, the court would give him the benefit of the doubt.

Distinction between Deviation and Change of Voyage.

It is important to bear in mind the distinction between a deviation and an entire change of voyage. As to the former, a mere intention formed to deviate does not avoid the policy until that point is reached where the act of deviating commences. Up to that point the policy is still in force. On the other hand, a change of voyage avoids the policy ab initio, because that substitutes a different risk from the one on which the underwriter has made his calculations.

The usual test as between the two is that, as long as the termini remain the same, and the master, on leaving, intends to go to the terminus named, and then goes out of his way, or is guilty of an unreasonable delay, it is a deviation; but, if the terminus is changed, then it is a change of voyage.

This is well illustrated by the case of *Marine Ins. Co. of Alexandria v. Tucker*.⁷ There, a vessel was insured at and from Kingston, Jamaica, to Alexandria. The captain, at

⁶ 1 Spr. 141, Fed. Cas. No. 3,398.

⁷ 3 Cranch, 357, 2 L. Ed. 466.

Kingston, took on a cargo for Baltimore, intending to go to Baltimore, and then to Alexandria. His ship was captured before reaching the Capes. The court held that this was merely an intended deviation, as the actual deviation would not have commenced until he had gone inside of the Capes to the parting of the ways for the two ports, and that, as no man could be punished for a mere intention, the underwriters were liable. In such case, had he intended to go to Baltimore alone, and not to Alexandria (the terminus named in the policy) at all, it would have been a change of voyage, and his policy would have been void at once.

SAME—ILLEGAL TRAFFIC.

29. It is an implied condition that a vessel shall not engage in illegal trade.

This is but another phase of the principle that a contract tainted with illegality is void. Hence any trade which contemplates dealing with an alien enemy, or a violation of the revenue laws of the country whose law governs the policy, renders the contract void.

Care must be taken, in considering this question, to remember the difference between the effect of illegal trade known to the parties and its effect when unknown. Even when equally known to both parties, the contract is void, because the court will not lend its aid to enforce such contracts. On the other hand, such a voyage known to one party and unknown to the other is void on an entirely different principle, namely, that the failure of the insured to give the underwriter information of the character of the trade avoids the policy on the ground heretofore discussed of misrepresentation or concealment.

An interesting case on this subject is the decision of Mr. Justice Story in the case of *ANDREWS v. ESSEX FIRE*

& MARINE INS. CO.¹ There insurance had been effected on the cargo to proceed to Kingston, Jamaica. It was known to both parties that the British government forbade American vessels carrying such cargoes there, but both parties thought that the prohibition might be removed by the time the vessel landed. The court held that the knowledge of the underwriters that the trade was illicit did not make them assume that risk, and that it was a risk not covered by the policy.

In the case of *Clark v. Protection Ins. Co.*,² which also was a decision of Mr. Justice Story, another party contemplated no illegality during the voyage, but when the ship arrived at the port of New Orleans the master took on board a chain cable, which had been bought at his request in Nova Scotia, brought there on another ship, and smuggled on board his vessel. After this she sailed from the port of New Orleans, and was lost. The underwriters contended that this act vitiated the entire insurance. The court held, however, that, as the insurance was originally valid, any subsequent illegality in the voyage did not affect the insurance as to property not tainted with the illegality, although no recovery could be had for the special property which was so tainted.

In the case of *Craig v. Insurance Co.*,³ an American during the war between the United States and England took out a British license. Mr. Justice Washington held that, as this was an illegal voyage throughout, there could be no remedy upon an insurance policy covering it.

The case of *Calbreath v. Gracy*⁴ involved a somewhat similar question, though the warranty in that case was express, and not implied. The warranty was of neutrality, the

§ 29. 13 Mason, 6, Fed. Cas. No. 374.

² 1 Story, 109, Fed. Cas. No. 2,832.

³ Fed. Cas. No. 3,340, Pet. C. C. 410.

⁴ 1 Wash. C. C. 219, Fed. Cas. No. 2,296. See, also, *Schwartz v. Insurance Co.*, 3 Wash. C. C. 117, Fed. Cas. No. 12,504.

vessel and cargo being warranted as American, but during the voyage she was documented as Spanish, and while so documented was captured by a foreign privateer, and afterwards recaptured by a British privateer. The court held that the warranty that the vessel was American implied a warranty that there should be the necessary documents to show it, and that the act of the insured in having their vessel documented as Spanish defeated their right of recovery.

Violation of Revenue Laws of Another Country.

It is a well-settled principle of English law that the English courts pay no attention to the revenue laws of another country; and therefore it is not illegal per se to endeavor to smuggle goods into another country. Of course, in an insurance policy, as such an act would increase the risk, failure to tell the underwriter, at the time of effecting the insurance, that it was contemplated, would be a concealment, and avoid the policy on that ground. But, if both the underwriter and insured knew that such action was contemplated, the policy would be valid, and the underwriter would be held liable, although under exactly similar circumstances an attempt to smuggle into England would be an illegal contract, and avoid the policy.

Mr. Parsons, in his work on marine insurance,⁵ states this as a general principle of insurance law, equally applying to this country, and cites some American decisions to sustain him. One of these is the decision of Mr. Justice Story in the case of *Andrews v. Essex Fire & Marine Ins. Co.*, above referred to; and certainly in that opinion the justice seems to assume that the underwriters would be bound if they knew that illegal trade with a port of a foreign country was contemplated. The decision cannot be considered as absolutely in point, as the underwriters were held not liable on another ground.

This lax view of the international relations of one coun-

⁵ 1 Pars. Mar. Ins. p. 34.

try with another may be law in America as far as circuit court decisions and the decisions of state courts can make it so. The author, however, can but hope that, if the question is ever finally presented to the supreme court of the United States,—especially at this period, when such great advance has been made in international ethics,—that court will decide it the other way.

In the case of *Oscanyan v. Winchester Arms Co.*,^a a Turkish consul living in this country made a contract with the Winchester Arms Company by which he was to receive a commission on all the arms of that company which he influenced his government to buy. When he sued for such commissions, the supreme court decided that the contract was void as against public policy, and not enforceable. It was urged upon the court that, while such contracts were undoubtedly void under our law, they were quite the proper thing under Turkish law, and that it was a recognized right of Turkish officials to serve their government in that way. The supreme court, however, repudiated the argument, and held that it was a question regarding our own citizens, and that, if such transactions might have the effect of demoralizing them, it would not enforce any rights based upon them. This decision, though not exactly in point on the question above discussed, would, at least, indicate a possibility that the supreme court would think it just as illegal to defraud a foreign government by smuggling as by giving commissions on arms purchased for it.

THE POLICY AND ITS PROVISIONS AS TO RISK AND PERILS INSURED AGAINST.

30. The written contract of insurance is called a “policy.”

^a 103 U. S. 261, 26 L. Ed. 539.

The better opinion is that the word "policy" is from the Latin "polliceor,"—"I promise." The forms of policies vary. The most common is the English form, which has been in use for a long time, and the American forms in use in Boston and New York. These vary materially in their general provisions, and, of course, the stipulations in them are varied to suit the special circumstances.

The English form will be found in Appendix No. 1 of Park on Insurance. It has been frequently criticised by the courts as ambiguous and inartificial, but its various provisions have now been so generally construed that it is well understood.

A good example of the American form will be found in the case of *SUN MUT. INS. CO. v. OCEAN INS. CO.*¹ This was a reinsurance policy on goods, but the important clauses commonly in use will be found embodied in it.

Of the Beginning and End of the Risk.

The clause in the English form bearing upon this is worded as follows: "Beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship * * * upon the said ship," etc., "and so shall continue and endure during her abode there, upon the said ship," etc. "And, further, until the said ship, with all her ordnance, tackle, apparel," etc., "and goods and merchandise whatsoever shall be arrived at ——— upon the said ship," etc., "until she hath moored at anchor twenty-four hours, in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed."

The American policy above referred to expresses all this much more simply, as follows: "Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel at ——— aforesaid, and so shall continue and endure until the

§ 30. ¹ 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

said goods and merchandise shall be safely landed at ——— aforesaid.”

In filling up the blank indicating the voyage, the initial point is frequently described as “at and from ——— to ———.” The meaning of these words varies according to circumstances. They cover injuries received in the initial port in the ordinary course of preparing for the voyage, provided the delay is not unreasonable. For instance, the case of *THE LISCARD* ² was a case of insurance on a cargo of wheat “at and from New York,” and bound for Lisbon. After the loading of the vessel, the signing of her bills of lading, and other preparations to leave port, the vessel cast off her lines for the purpose of starting, but, on account of some trifling derangement of her engines, again made fast to her wharf. While lying there she was run into by a barge. She was surveyed, pronounced seaworthy, and started, meeting very heavy weather, which caused water to damage the wheat. The court held that the policy had attached at the time of this collision.

In the case of *Haughton v. Empire Marine Ins. Co.*,³ a vessel while at sea was insured “lost or not lost, at and from Havana to Greenock.” In entering the harbor of Havana she grounded, and received damage. The court held that under such circumstances the words were used in a geographical sense, the ship being in the geographical limits of the harbor of Havana in the sense of the policy, and that, therefore, the policy had attached. In this case the injury was received from the anchor of another ship in the harbor after her arrival within its limits.

The case of *Seamans v. Loring* ⁴ was a decision of Mr. Justice Story. In reference to the meaning of these words

² (D. C.) 56 Fed. 44; *London Assurance v. Companhia De Moagens Do Barreiro*, 15 C. C. A. 379, 68 Fed. 247; *Id.*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113.

³ L. R. 1 Exch. 206.

⁴ 1 Mason, 127, Fed. Cas. No. 12,583.

he says: "The next question is, at what time, if ever, did the policy attach? The insurance is 'at and from,' etc. What is the true construction of these words in policies must, in some measure, depend upon the state of things and the situation of the parties at the time of underwriting the policy. If at that time the vessel is abroad in a foreign port, or expected to arrive at such port in the course of the voyage, the policy, by the word 'at,' will attach upon the vessel and cargo from the time of her arrival at such port. If, on the other hand, the vessel has been at no time in such port without reference to any particular voyage, the policy will attach only from the time that preparations are begun to be made with reference to the voyage insured." In this case there was an unreasonable delay in sailing, and he instructed the jury that such an unreasonable and unnecessary delay prevented the policy from attaching during this preparation, and that the policy did not attach until the vessel began her preparations for the voyage insured.

As to the question when the voyage terminates, the courts have held that it lasts, under the language of the policy, until she has been moored twenty-four hours in good safety, and that a vessel which arrives as a wreck incapable of repair, and is lost in the port of final destination under such circumstances, even after being moored, has never arrived "in good safety," in the meaning of this clause, and that, therefore, the underwriters are liable.⁵

An interesting case on the meaning of these words "in good safety" is that of *LIDGETT v. SECRETAN*.⁶ There the ship *Charlemagne*, insured from London to Calcutta, with this clause in the policy, sustained considerable damage at sea, so as to require constant pumping, but still not so serious as to make her an absolute wreck. She arrived at Calcutta in this condition on October 28, 1866. After un-

⁵ *Shawe v. Felton*, 2 East, 109.

⁶ L. R. 5 C. P. 190.

loading she was taken on November 12th to a dry dock for survey and repairs, and was destroyed by accidental fire on December 5th. The court held that, as she had arrived, and been moored for twenty-four hours in good safety as a ship, and not as a mere wreck, the risk had terminated, and the underwriters were liable for the loss incurred before entering the port, but not for the fire which had happened after such anchoring.

The anchoring must be at the place of final discharge. Coming to anchor in port with the intention of entering the dock afterwards is not a final mooring in the sense of this clause.⁷

The Perils Insured against.

The ordinary language in an English policy enumerating the perils is as follows: "Touching the adventures and perils which we, the assurers, are content to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, quality, or condition soever, barratry of the masters and mariners, and all other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship."

SAME—PERILS OF THE SEAS.

31. "Perils of the seas" mean all losses or damage which arise from the extraordinary action of the wind and sea, or from extraordinary causes external to the ship, and originating on navigable waters.

The phrase does not cover ordinary wear and tear, nor does it cover rough weather or cross seas. There must be

⁷ Samuel v. Assurance Co., 8 Barn. & C. (15 E. C. L. 66) 119.

something extraordinary connected with it.¹ Under this principle the supreme court has held that injury to a vessel from worms in the Pacific, if an ordinary occurrence in that locality, is not included in the phrase.²

On the other hand, injuries received from accidentally striking the river bank in landing, in consequence of which the vessel sank, are included in the term.³

It also covers a loss caused by a jettison of part of the cargo.⁴

In the case of *Potter v. Suffolk Ins. Co.*,⁵ Justice Story held that injury caused to a ship by striking on some hard substance in the harbor, due to the ebbing of the tide, is a loss by a peril of the sea, unless it was mere wear and tear, or unless it was an ordinary and natural occurrence. Injuries caused from the negligence of the master or crew are also covered, unless, of course, there is an express stipulation against them,—as is not uncommon.⁶

In policies which contain an exception protecting the insurer from injuries caused by lack of ordinary care and skill of the navigators, it is the tendency of the courts to construe this phrase strictly against the insurer. They construe it in such cases to apply rather to the general qualifications of the crew than to their carelessness in particular instances.⁷

The courts also hold that injuries received by collision with another vessel are covered, though not injuries inflicted. This question is discussed in the case of *GENERAL*

§ 31. ¹ *The Gulnare* (C. C.) 42 Fed. 861.

² *Hazard v. Insurance Co.*, 8 Pet. 557, 8 L. Ed. 1043.

³ *Seaman v. Insurance Co.* (C. C.) 21 Fed. 778.

⁴ *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58.

⁵ 2 Sumn. 197, Fed. Cas. No. 11,339.

⁶ *Rogers v. Insurance Co.*, 35 C. C. A. 396, 95 Fed. 103; *Orient Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

⁷ *Egbert v. Insurance Co.* (D. C.) 71 Fed. 739.

MUT. INS. CO. v. SHERWOOD,⁸ in which the opinion was rendered by Justice Curtis.

In the case of *Peters v. Warren Ins. Co.*,⁹ the court held that under the term "perils of the sea" the insured could recover not only the damage received by his vessel, but the amount that he had to pay in general average, under the provisions of the German law, to the other vessel. As to the latter part of this decision, however, it turned upon the peculiar provisions of the German law of average, making the vessel liable in such case even without fault. But it was not intended by the supreme court in that case to decide the general proposition that the above term quoted in the policy gave the right to recover for injuries inflicted. In this respect the law of England is the same as that of America.¹⁰

The clause covers fire caused by negligence of the crew, the proximate cause in that case being taken to be the fire; but, if the fire was caused not by the mere negligence, but by design, then the proximate cause would not be the fire, but the design, and the underwriter would be liable if his policy covered barratry, but not if otherwise.¹¹

SAME—BARRATRY.

32. Barratry is an act committed by the master or mariners of the ship for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury.

The above is the definition given by Justice Story in the case of *Marcadier v. Chesapeake Ins. Co.*¹

⁸ 14 How. 357, 14 L. Ed. 452.

⁹ 14 Pet. 99, 10 L. Ed. 371.

¹⁰ *De Vaux v. Salvador*, 4 Adol. & E. (31 E. C. L. 195) 420.

¹¹ *Waters v. Insurance Co.*, 11 Pet. 213, 9 L. Ed. 69.

§ 32. 18 Cranch, 39, 3 L. Ed. 481.

The courts have found great difficulty in giving any satisfactory definition of this act. The meaning of the term is discussed at great length and learnedly in the case of *PATAPSCO INS. CO. v. COULTER*.² It seems to exclude the idea of mere negligence, to involve at least some element of design or intention or negligence so gross as to be evidence of such design or intention. In that case the final decision was that, where the loss was caused by a fire, and it appeared that the master and crew did not take proper steps to extinguish the fire, the cause of loss was the fire, and not the negligence of the crew, and therefore they held the insurer liable.

In the more recent case of *New Orleans Ins. Co. v. Albro Co.*,³ a voyage had been broken up, and the cargo sold. It was charged that the master made the sale in a method knowingly contrary to his best judgment, and to the injury of the parties interested. The court held that this, if so, would constitute barratry.

As barratry is something done to the prejudice of the owners, it follows that the master who is sole owner cannot commit barratry, as a man can hardly cheat himself; but, if he is part owner, he can be guilty of barratry towards his other owners.⁴

SAME—THEFTS.

33. Thefts in a marine policy, according to the better opinion, cover thefts from without the ship, and do not cover thefts by the crew.

This is the decision according to the great preponderance of English authority.¹ Parsons, in his *Marine Insurance*,

¹ 3 Pet. 222, 7 L. Ed. 659.

² 112 U. S. 506, 5 Sup. Ct. 289, 28 L. Ed. 809.

³ *Marcardler v. Insurance Co.*, 8 Cranch, 39, 3 L. Ed. 481; *Jones v. Nicholson*, 10 Exch. 28.

⁴ § 33. ¹ *Taylor v. Steamship Co.*, L. R. 9 Q. B. 546.

states that the weight of American authority would make the insurers liable for larceny by the crew.² His citations, however, hardly seem strong enough to check the reasoning of the English cases.

SAME—ALL OTHER PERILS.

34. "All other perils," etc., mean all other perils of the same general character.

These words, according to the construction placed upon them by the courts under the rule of *ejusdem generis*, are intended as a general safeguard to cover losses similar to those guarded against by the special enumeration, and not in as sweeping a sense as the mere language would mean.

The leading case as to the meaning of these words is *THAMES & M. MARINE INS. CO. v. HAMILTON*,¹ wherein Lord Bramwell, in his opinion, in reference to the meaning of these words, uses the following language: "Definitions are most difficult, but Lord Ellenborough's seems right: 'All cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes.' I have had given to me the following definition or description of what would be included in the general words: 'Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance.' Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes, L. J., in *Pandorf v. Hamilton* [16 Q. B. Div. 629], very good: 'In a seaworthy ship, damage of goods caused by the action of the sea during transit, not attributable to the fault of anybody,' is a damage from a

² 1 Pars. Mar. Ins. 563-566, and notes.

§ 34. ¹ 12 App. Cas. 484.

peril of the sea. I have thought that the following might suffice: 'All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such.' " And Lord Herschell, in his opinion, discusses the cases which had previously passed upon them. The case was an insurance under a time policy, in which, under English law, as previously stated, there is no implied warranty. The donkey engine was being used pumping water into the main boilers, but, owing to the fact that a valve was closed which ought to have been left open, the water was forced into and split open the air chamber of the donkey pump. The court held that, whether the closing of the valve was accidental or due to the negligence of the engineer, it was not such an accident as was covered either by the words "perils of the sea," or by the general saving clause above quoted.

PROXIMATE CAUSE OF LOSS.

35. Where an injury is due to more than one cause, the last efficient cause in the chain of causation is assumed to be the cause of the loss, under the maxim that the proximate, and not the remote, cause should be considered.

The question what is the proximate and what the remote cause gives rise to some of the most difficult points in marine insurance law. The only general rule is that laid down above, and, like most general rules, its difficulties lie in its application. A few examples may illustrate the subject more clearly.

In the case of *IONIDES v. UNIVERSAL MARINE INS. CO.*,¹ a vessel loaded with coffee was insured under the ordinary policy, which contained a warranty "free from all consequences of hostilities." It was during the Civil

§ 35. 14 C. B. N. S. (108 E. C. L.) 259.

War, and the Confederates had extinguished Hatteras Light as a means of embarrassing the navigation of the Federal ships. The captain, on his way from New Orleans to New York, supposing that he had passed Cape Hatteras, when he had not, changed his course in such a way that his vessel went ashore. The Confederate authorities took him and his crew as prisoners. Federal salvors came down, and saved part of the coffee, and might have saved more but for the interference of Confederate troops. In a day or two the vessel was lost. The court held, under these circumstances, that, as to that part of the coffee which remained aboard, it was lost by a peril of the sea, that being the proximate cause, and not the act of the Confederates in extinguishing the light; but that as to the cargo which was saved, and as to that part which could have been saved but for the interference of the Confederate authorities, the proximate cause was the consequence of hostilities, and that as to that part the underwriters were not liable.

In the case of *Mercantile S. S. Co. v. Tyser*,² the insurance was on freight during a certain voyage. The charter party contained a clause that the charterers might cancel the charter party if the vessel did not arrive by the 1st of September. The ship started from England on the 7th of August, but her machinery broke down, and she had to put back. The time lost caused her to arrive in New York after the 1st of September, and the charterers canceled the charter party. The court held that the proximate cause of the loss of freight was not the breaking down of the machinery, but the option exercised by the charterers of canceling the charter party, and that, therefore, the underwriters were not liable.

In the case of *Dole v. New England Mut. Marine Ins. Co.*,³ a vessel was captured by the Confederate cruiser *Sum-*

² 7 Q. B. Div. 73.

³ 2 Cliff. 394, Fed. Cas. No. 3,966.

ter. As she could not be brought into any port of condemnation, her captors set her on fire and destroyed her. The policy contained a clause warranted free from capture. It was argued, *inter alia*, that the proximate cause of the loss was the fire, and not the capture. Justice Clifford held, however, that the proximate cause was the capture and the acts of the captors, and that the underwriters were not liable.

The case of *HOWARD FIRE INS. CO. v. NORWICH & N. Y. TRANSP. CO.*⁴ arose under a fire insurance policy. The steamer Norwich collided with a schooner, injuring her own hull below the water line. She rapidly began to fill, and 10 or 15 minutes after the collision the water reached the fire of the furnace, and the steam thereby caused blew the fire around, and set fire to the woodwork of the boat. In consequence, she burned until she sank in deep water. The injury from the collision alone would not have made her sink. The court held that the fire was the efficient predominating cause nearest in time to the catastrophe, and that the underwriters were liable for that part of the injury which was caused by the fire.

In the case of *Orient Mut. Ins. Co. v. Adams*,⁵ the master of the steamer Alice, lying above the falls of the Ohio near Louisville, gave the signal to cast the boat loose, and started when she did not have steam enough to manage her. There was no clause in the policy exempting the insurers from liability for the negligence of the master or crew. The vessel was carried over the falls, and the court held that the proximate cause was the damage done by going over the falls, which was a peril of navigation, and not the act of the master, that being a remote cause.

A like application of the rule of *causa proxima* is made to the sale of cargo in an intermediate port of distress to raise funds. Such a loss is not recoverable under the policy, as

⁴ 12 Wall. 194, 20 L. Ed. 378.

⁵ 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

the sea peril that caused the vessel to enter the port of distress is deemed a remote cause.⁶

THE LOSS—TOTAL OR PARTIAL.

36. A loss may be total or partial.

37. ACTUAL OR CONSTRUCTIVE—

A total loss may be actual or constructive.

- (a) There is an actual total loss where the subject-matter is wholly destroyed or lost to the insured, or where there remains nothing of value to be abandoned to the insurer.
- (b) There is a constructive total loss when the insured has the right to abandon.

Actual Total Loss of Vessel.

An actual total loss of a ship occurs when the vessel is so injured that she no longer exists in specie as a ship. If she still retains the form of a ship, and is susceptible of repair, it is not an actual total loss.

In the case of *BARKER v. JANSON*,¹ Wills, J., says: "If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purpose of a ship; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship."

In the case of *Delaware Mut. Safety Ins. Co. v. Gossler*,² Clifford, J., uses substantially the same language.

⁶ *Powell v. Gudgeon*, 5 Maule & S. 431; *Ruckman v. Insurance Co.*, 5 Duer (N. Y.) 371.

§§ 36-37. ¹ L. R. 3 C. P. 303.

² 96 U. S. 645, 24 L. Ed. 863.

Actual Total Loss of Goods.

There is a total loss of goods not only when they are absolutely destroyed, but when they are in such a state that they cannot be carried in specie to the port of destination without danger to the health of the crew, or when they are in such a state of putrefaction that they have to be thrown overboard from fear of disease.³

Interesting questions often arise when there is an insurance against total loss only on goods and part of the goods are lost. If the goods are all of the same kind, and a part of them are lost, then, under the ordinary language of the policy, the loss would be partial only. But, if there were different kinds of goods insured under one policy, the courts hold, unless the language of the policy is specially worded to exclude it, that there is a total loss of separate articles, even though there may not be a total loss of the whole.

This question is discussed in the case of *Woodside v. Canton Ins. Office*.⁴ That was an insurance against total loss only, or, what has been held to mean about the same thing, "warranted free from all average," on personal effects of the master of the vessel. The personal effects consisted of a variety of different articles. The vessel was lost, and so were all the master's effects, except a sextant and a few small articles. The court held that there was a total loss of the different articles which were not saved, although some of the personal effects were saved.

On the other hand, in *Biays v. Chesapeake Ins. Co.*,⁵ the insurance was on a cargo of hides. Some of the hides were entirely lost. The court held, however, that as the insurance covered only one article, namely, hides, this was a partial loss on the entire subject of insurance, and not a total loss of some of the different subjects of insurance.

³ *Hugg v. Insurance Co.*, 7 How. 595, 12 L. Ed. 834.

⁴ (D. C.) 84 Fed. 283; *Id.*, 33 C. C. A. 63, 90 Fed. 301.

⁵ *Washburn & M. Mfg. Co. v. Insurance Co.*, 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49; 7 Cranch, 415, 3 L. Ed. 389.

But where the subject insured is a single unit, though composed of different parts, the loss of one of those parts, which renders the others absolutely useless, and which could not be replaced at an expense less than the cost of the entire unit, makes it a total loss.

In the case of *Great Western Ins. Co. v. Fogarty*,⁶ there was insurance upon a sugar-packing machine composed of various different units. Some of these parts were lost, and could not have been replaced for less than the price of a new machine. Some were saved, but were only valuable as scrap iron. The court held that this was a destruction of the machine in specie, and therefore a total loss.

Actual Total Loss of Freight.

There is a total loss of freight whenever there is a total loss of cargo or when the voyage is broken up and no freight is earned. But if the vessel can be repaired in sufficient time to carry her cargo without frustrating the objects of the voyage by delay, or the cargo is in a condition to be shipped by another vessel and another vessel is procurable, there is not a total loss of freight.⁷

SAME—ABANDONMENT.

38. Abandonment is the surrender by the insured, on a constructive total loss, of all his interest, to the insurer, in order to claim the whole insurance.

(a) Under the American rule, if the cost of saving and repairing a vessel exceed one-half her value when repaired, the owner, by giving the underwriter notice of abandon-

⁶ 19 Wall. 640, 22 L. Ed. 216.

⁷ *Hugg v. Insurance Co.*, 7 How. 595, 12 L. Ed. 834; *Jordan v. Insurance Co.*, 1 Story, 342, Fed. Cas. No. 7,524.

ment, may surrender his vessel to the underwriter, and claim for a total loss.

- (b) Under the English rule, he can do the same thing if the ship is so much injured that she would not be worth the cost of repair.

This is the most striking difference between the American and English law of marine insurance. Under the American law, as stated above, the right of abandonment is governed by the facts as they appear at the time of the abandonment. If, therefore, at that time, under the highest degree of probability, the cost of saving and repairing the vessel would exceed one-half of her value when repaired, the insured may abandon.¹

In the absence of special stipulations, the cost must exceed one-half the value of the vessel when repaired at the place of disaster, and the policy value of the vessel or her value in the home port is no criterion.

In consequence of these decisions, it has become common to provide in the policy itself that the right of abandonment shall not exist unless the cost of repairs exceeds one-half the agreed valuation. Such a stipulation is, of course, valid, but there also the right of abandonment is determined by the facts as they exist at the time, and is not divested by the fact that the vessel may subsequently be saved for less.² The case of *Currie v. Bombay Native Ins. Co.*³ was a case of insurance on cargo and disbursements. The vessel was wrecked, and the captain made no effort to save the cargo. It appeared from the facts that the cargo could at least have been partially saved if he had. The ship was a total wreck. The court held that this was not a total loss of the

§ 38. ¹ *Bradlie v. Insurance Co.*, 12 Pet. 378, 9 L. Ed. 1123; *Wallace v. Insurance Co. (C. C.)* 22 Fed. 66.

² *Orient Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68, 31 L. Ed. 63.

³ L. R. 3 P. C. 72.

cargo by the peril insured against, but that it was a total loss of the disbursements.

SAME—AGREED VALUATION.

39. The valuation fixed in the policy is binding, though it may differ from the actual value.

In passing upon the rights and obligations of insured and underwriters, the valuation in the policy, except as above stated, is taken as conclusive upon the parties. Although this may sometimes partake of the nature of wager policies, yet the convenience of having a certain valuation as a basis to figure on, and the diminution of litigation thereby, have caused the courts to hold the parties to their valuation. The firmness with which they hold to this doctrine may be judged by the case of *BARKER v. JANSON*,¹ where, at the time the policy attached, the ship, on account of injuries, was practically of no value at all, yet the court held both parties bound by the valuation.

In the case of *North of England Iron S. S. Ins. Ass'n v. Armstrong*,² a policy of insurance was effected for £6,000 on a vessel valued at £6,000. She was sunk in collision, and the underwriters paid for a total loss. Her real value was £9,000. Subsequently £5,000 was recovered from the colliding vessel. The court held that it all belonged to the underwriter by subrogation to the insured, and that the assured could not take any part of it in payment for the actual valuation of his vessel uninsured.

In the case of *International Nav. Co. v. Atlantic Mut. Ins. Co.*,³ the vessel was valued at \$2,000,000 for the purpose of an average settlement which was due. The valuation in the policy was \$1,350,000. The underwriters

¹ § 39. 1 L. R. 3 C. P. 303.

² L. R. 5 Q. B. 244.

³ (D. C.) 100 Fed. 314.

claimed that, as the vessel owner had recovered in general average from the other interests on the basis of the higher valuation, they should be entitled to share any such average recovery to the extent of the excess of valuation. In other words, they contended that the owner should be treated as constructive insurer of the difference between the agreed valuation and the actual valuation as fixed by the general average, which would have made them liable for only about two-thirds of what they would be liable for if the actual valuation had been adopted. Judge Brown, however, held that this valuation was conclusive upon them, drawing a distinction in his opinion between the rule as to ships in such cases and the rule as to goods. Here, as will be seen, the valuation fixed by the policy was less than the actual valuation.

Under these same circumstances, however, the English courts seem to hold differently. In the case of *Balmoral Steamship Co. v. Marten*,⁴ the vessel was insured for £33,000, and valued at the same sum. After a disaster a general average was had, and the valuation of the vessel in general average was fixed at £40,000. Wigham, J., held that the insurers, under these circumstances, were liable only for thirty-three fortieths.

The question when a loss is partial and when total has been discussed under the head of total loss.

The term "particular average" is nearly synonymous with "partial loss," and policies which contain clauses "warranted against particular average" or "warranted against average" are practically policies insuring against total loss only.

The measure of recovery in case of partial loss is in one respect strikingly different from the measure of recovery in fire insurance. If a house is insured against fire for \$5,000. and the value of the house is \$10,000 and the loss is \$5,000.

⁴ [1900] 2 Q. B. Div. 748. As to the valuation, see, also, the *Potomac*, 105 U. S. 630, 26 L. Ed. 1194.

the insured recovers the full value of his policy. Under similar circumstances in marine insurance, he only recovers such proportion of the loss as the insured portion bears to the total value, it being considered that as to that part of the value which is not insured he is his own insurer, and must contribute to the loss to that extent.⁵ In arriving at these proportions, the actual value of the subject insured is taken, except where there is an insured value fixed in the policy, in which case the insured value is taken.

SAME—SUBROGATION OF INSURER.

40. An insurer who has paid the insurance is subrogated to the rights of the insured against others liable to the insured for the loss.

The insured is entitled to recover his loss from the underwriter, even though he may possess other remedies for it. For instance, if he can recover back part of the loss in general average, the underwriter must still pay him, and look to the collection of the average himself, and not force the insured to exhaust his remedies on general average.¹

But, when the underwriter has paid the loss, he is entitled by subrogation to all the rights of the insured against any other parties for the recovery of all or part of what he has paid. In such case, he stands in the shoes of the assured, and has no greater rights than the assured himself would have, so that, if the assured has stipulated away his right by any enforceable clause in a bill of lading or otherwise, the underwriter cannot recover. This right of subrogation springs, not necessarily from assignment, but from the general principles of equity.²

⁵ 2 Pars. Mar. Ins. 405; *Western Assur. Co. v. Transportation Co.*, 16 C. C. A. 65, 68 Fed. 923.

§ 40. ¹ *International Nav. Co. v. Insurance Co.*, 100 Fed. 304.

² See, as illustrating the extent of this doctrine: *Liverpool & G.*

SAME—SUING AND LABORING CLAUSE.

- 41. In addition to the amount of his loss, the insured may recover, under the suing and laboring clause of the policy, expenses incurred by him in protecting the property.**

In the old English policy this clause was in the following language: "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said goods and merchandise, and ship," etc., "or any part thereof, without prejudice to this insurance."

In later policies the clause has been modified largely in the interests of the underwriter, but the general language of it is the same. This clause is intended, in mutual interest, to encourage the assured to do everything towards making the loss as light as possible; and the expenses thereby incurred are recoverable outside of the other clauses of the policy, even though in some instances it enables the assured to recover more than the face value of the policy. In other words, the assured may recover a certain amount under that clause of the policy giving him the right to recover for loss caused by the perils of the sea, etc., and this additional amount as expended for the general benefit, and this, too, often in policies insuring against total loss only. And, since an abandonment under the American decisions relates back, the underwriters are liable for the acts of the master after abandonment, as he is then their agent.¹

W. Steam Co. v. Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Wager v. Insurance Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013; *Fairgrieve v. Insurance Co.*, 37 C. C. A. 190, 94 Fed. 686; *Hall v. Railroad Co.*, 13 Wall. 367, 20 L. Ed. 594.

§ 41. ¹ *Gilebrist v. Insurance Co.*, 104 Fed. 566.

The acts of the insurer or the underwriter, in sending and making efforts to save, cannot be construed as an acceptance of the abandonment.²

This clause, however, only covers such acts of the underwriter as are authorized by the policy. If the underwriter takes the vessel to repair her, intending to return her, and keeps her an unreasonable time, and then returns her, not in as good condition as she was before, the suing and laboring clause will not protect him, and his acts in so doing, being unauthorized by the suing and laboring clause, will be held an acceptance of the notice of abandonment.³

² *RICHELIEU & O. NAV. CO. v. INSURANCE CO.*, 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398.

³ *Washburn & M. Mfg. Co. v. Insurance Co.*, 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49; *Copelin v. Insurance Co.*, 9 Wall. 461, 19 L. Ed. 739.

CHAPTER IV.

OF BOTTOMRY AND RESPONDENTIA; AND LIENS FOR SUPPLIES, REPAIRS, AND OTHER NECESSARIES.

- 42. "Bottomry" Defined.
- 43. Requisites of Bottomry Bond.
- 44. Respondentia.
- 45. Supplies, Repairs, and Other Necessaries.
- 46. "Material Man" Defined.
- 47. Necessaries Furnished in Foreign Ports.
- 48. "Necessaries" Defined.
- 49. Necessaries Furnished Domestic Vessels.
- 50. Domestic Liens as Affected by Owner's Presence.
- 51. Shipbuilding Contracts.
- 52. Vessels Affected by State Statutes.

"BOTTOMRY" DEFINED.

42. This is an obligation executed generally in a foreign port by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed upon, which bond creates a lien on the ship which may be enforced in admiralty in case of her safe arrival at the port of destination, but becomes absolutely void and of no effect in case of her loss before arrival.¹

This is an express lien created by act of the parties.

The Admiralty Lien.

Admiralty is not a difficult branch of the law, and the difficulties of this part arise not inherently, but from the con-

§ 42. ¹ THE GRAPESHOT, 9 Wall. 129, 19 L. Ed. 651.

fusion incident to the use of the word "lien." To the student of the common law its use suggests the ideas which our studies in that branch associate with it; and, even if there was such a production in those modern specialist times as an admiralty lawyer ignorant of all other law, the confusion would still exist to a lesser extent, since the word is used in different senses in marine law itself.

The admiralty lien, pure and simple, is strikingly dissimilar from the common-law lien. Take a common-law mortgage as an illustration. There the title to the security is conditionally conveyed to the creditor and he has a property interest in it. Take, on the other hand, the hotel keeper who retains the trunks of his guests till they pay for their wine. The moment he relinquishes possession of the trunks he loses his security, for his lien depends on possession. In other words, the common-law liens give the creditor a qualified title or right of possession as security for a personal debt due by the owner and as incident to such a debt.

The admiralty lien is entirely different. Its holder has no right of possession in the ship. It exists as a demand against the ship itself as a contracting or wrongdoing thing, irrespective of the fact whether the creditor has any personal action against the owner or not. It is not a mere incident to a debt against the owner, but a right of action against the thing itself,—a right to proceed in rem against the ship by name, in which the owner is ignored, may never appear, and appears, if at all, not as defendant, but as claimant. It is nearer what the civil law terms a "hypothecation,"—a privilege to take and sell by judicial proceedings in order to satisfy your demand. This shows how little it has in common with the common-law lien.

As said above, there are liens in admiralty law enforceable by admiralty process which yet are not admiralty liens in the above sense. Such is the lien of the ship on the cargo for freight and demurrage, which is lost by delivery. It is to be regretted that the term was not limited to such cases,

and some better expression, such as a privilege or right of arrest, substituted in the others.

The lien by bottomry is a good instance of maritime hypothecation. It is a debt of the ship, arises out of the necessities of the ship, and is good only against the ship. If the ship meets with a marine disaster, and seeks shelter and restoration in a port where she and her owners are strangers without credit, her master may borrow money for the purpose of refitment, and secure it by a bond pledging the vessel for its payment, on arrival at her destination. As the bond provides that it shall be void in case she does not arrive, the principal is at risk, and therefore a high rate of interest may be charged without violating the usury laws.

The loss which avoids a bottomry bond is an actual total loss. The doctrine of constructive total loss is found only in the law of marine insurance, and does not apply in considering the law of bottomry.²

REQUISITES OF BOTTOMRY BOND.

43. The requisites for the validity of a bottomry bond are that the repairs or supplies must be necessary, and that the master or owner has no apparent funds or credit to pay for them available in the port.

But, if the lender satisfies himself that the supplies are necessary, he may, in the absence of knowledge, actual or constructive, as to the existence of funds or credit, presume, from the fact that the master orders them, that there is a necessity for the loan, and his lien will be upheld, in the absence of bad faith.

It is the duty of the master to communicate with the own-

² Delaware Mut. Safety-Ins. Co. v. Gossler, 96 U. S. 645, 24 L. Ed. 863; The Great Pacific, L. R. 2 P. C. 516.

er of the ship or cargo proposed to be bottomried if he can.¹ The modern facilities for communication and ease of transferring funds from port to port have rendered bottomry bonds less common than in former times. In America the right to bind a vessel for repairs and supplies as a maritime contract without any bottomry renders them rarely needed. The holder of a bottomry bond must enforce it promptly after the arrival of the ship, or he will be postponed to any subsequently vested interests.²

Among different bottomry bonds the last is paid first. This is another sharp distinction between admiralty and common-law liens. Among admiralty liens of the same general character, the last takes precedence; the theory being that the last is for the benefit of the preceding ones, and contributes to saving the ship in the best possible condition for all concerned.³ The case of *O'Brien v. Miller* ⁴ contains a form of bottomry bond printed in full.

RESPONDENTIA.

44. This is a hypothecation of cargo, similar in nature, purposes, requisites, and effect to the hypothecation of the vessel by bottomry.

A bottomry bond may hypothecate not only the vessel but the cargo. If it is on the cargo alone it is called a "respondentia bond." Since the master has greater powers as agent of the vessel owner than he has as agent of the cargo owner, it requires a stronger necessity and a stronger effort to communicate with the cargo owner in order to sustain a re-

§ 43. ¹ *The Karnak*, L. R. 2 Adm. & Ecc. 289; *Id.*, 2 P. C. 505.

² *The Charles Carter*, 4 Cranch, 328, 2 L. Ed. 636.

³ *The Omer*, 2 Hughes, 96, Fed. Cas. No. 10,510.

⁴ 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469. The following cases are interesting and typical: *The Virgin*, 8 Pet. 554, 8 L. Ed. 1036; *THE GRAPESHOT*, 9 Wall. 129, 19 L. Ed. 651.

spondentia bond than to sustain a bottomry.¹ In other respects the law as to the two is similar. Of course, admiralty courts have cognizance of suits to enforce these bonds.²

SUPPLIES, REPAIRS, AND OTHER NECESSARIES.

45. The lien of material men for supplies and repairs or other necessities is an instance of implied hypothecation, very similar to the bottomry lien for moneys advanced with the same object, the latter being an express hypothecation.

46. "MATERIAL MAN" DEFINED—A material man is one whose trade it is to repair or equip ships, or furnish them with tackle and necessary provisions.¹

Under the general admiralty law as expounded by the supreme court, the material man who furnished necessities to a vessel in a foreign port on the order of her master was presumed to credit the vessel, even though nothing was said on the subject, and he could therefore proceed against the vessel. The reason was the apparent necessity for credit in the absence of her owner, in order to enable the vessel to carry out the objects of her creation. As Mr. Justice Johnson expressed it in *The St. Jago de Cuba*,² it was to furnish wings and legs to the vessel to enable her to complete her voyage.

For the same reason, necessities furnished a domestic vessel gave no claim against the vessel, but could be asserted simply against the owner; for in such case the necessity for

§ 44. ¹ *THE JULIA BLAKE*, 107 U. S. 418, 25 Sup. Ct. 692, 27 L. Ed. 595.

² Admiralty Rule 18.

§§ 45-46. ¹ *The Neptune*, 3 Hagg. Adm. 142.

² 9 Wheat. 416, 6 L. Ed. 122.

the credit ceased, and the presumption would be that the credit was given to him.

It is proper to consider, then, (1) necessities furnished in foreign ports; (2) necessities furnished in domestic ports.

SAME—NECESSARIES FURNISHED IN FOREIGN PORTS.

47. For supplies furnished a foreign vessel on the order of the master in the absence of the owner the law implies a lien. But the presumption is against a lien if ordered by the owner or by the master when the owner is in the port.

As the master in a proper case may bind the vessel for such necessities by means of a bottomry bond, so he may contract direct with the material men. By so using his ship as a basis of credit, he saves the marine interest usually charged in such bonds. The test of his power is the needs of his vessel. He cannot do this unless the necessity is shown for the supplies or repairs, but when that is shown the rest is presumed. The material man may then assume from the necessity of the repairs, and the fact that the master ordered them, that a necessity exists for the credit, even though in point of fact the master had funds which he might have used. Only knowledge of this fact or willful shutting of the eyes to avoid knowledge would defeat the material man's claim.¹ As the basis of this implied hypothecation is the power of the master as agent of the owner in the latter's absence, the presence of the owner defeats the master's implied power, and in such case the presumption in the absence of other evidence of intent is that credit was given to the owner.²

§ 47. ¹ THE KALORAMA, 10 Wall. 204, 19 L. Ed. 944.

² THE VALENCIA, 165 U. S. 270, 271, 17 Sup. Ct. 323, 41 L. Ed.

But in such case the owner himself may bind the vessel by agreeing that the material man may look to the vessel; and, indeed, if it appeared that the owner had no credit or was embarrassed or insolvent, the presumption would probably be that the credit was given to the vessel, and not to him.³

It is largely a question of fact, governed by the special circumstances of each case. The fact that the supplies are charged to the vessel by name on the creditor's books is regarded as evidence of an intent to credit the vessel, though not very strong evidence, as such entries are self-serving.⁴

This power is one that cannot be delegated, and is limited to the master or actual owner. Suppose the vessel is chartered,—that is, hired by the owner to some one else to operate her,—under an agreement that the charterer is to furnish all running supplies and the owner is to furnish the crew. In that case it is thoroughly settled that the material man cannot proceed against the vessel for such supplies furnished, even on the order of the master, if the material man knew or could have ascertained that the charterer's power was so limited.⁵ And this is true as to a vendee in possession under a sale, where the vendor retains title till payment. He cannot bind the vessel.⁶

Even in case of chartered vessels, if the supplies were ordered in a foreign port by the master, it would seem that the vessel would be bound, unless the material man knew or could have ascertained the limitations of the charter party.

By "foreign port" is meant not simply ports of foreign

³ *THE KALORAMA*, 10 Wall. 204, 19 L. Ed. 944; *The Patapsco*, 13 Wall. 329, 20 L. Ed. 696.

⁴ *The Mary Bell*, 1 Sawy. 135, Fed. Cas. No. 9,199; *The Samuel Marshall*, 4 C. C. A. 385, 54 Fed. 396; *The Ella* (D. C.) 84 Fed. 471.

⁵ *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; *THE VALENCIA*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

⁶ *The H. C. Grady* (D. C.) 87 Fed. 232.

countries, but in this respect the states also are foreign to each other. The character of the vessel is presumptively determined by her port of registry, so that, if a vessel registered in New York goes to Jersey City, she is in a foreign port for the purposes of this doctrine.⁷

This, however, is only a presumption, and may be overcome by showing the real residence of the owner. Hence, if a vessel, though registered in New York, has an owner living in Norfolk, and the supply man knows this, or by reasonable diligence could ascertain it, supplies ordered in Norfolk would be treated as ordered in the home port. And this is true also as to a charterer operating a ship under a charter that amounts to a demise.⁸

These claims, being maritime in their nature, take precedence of common-law liens. Hence, though not required by any law to be recorded, they take precedence of a prior recorded mortgage, on the maritime theory that, being intended to keep the ship going, they are for the benefit of other liens, as tending to the preservation of the res.⁹

How Waived or Lost.

Taking a note or acceptance for a claim of this sort is not a novation or waiver of the right to hold the vessel, unless so understood.¹⁰ Such a claim is lost under some circumstances by delay in enforcing it. In such cases it becomes "stale," to use the language of the admiralty judges. In its general principles the doctrine of staleness is substantially the same as the equitable doctrine of the same name. In its application admiralty is perhaps prompter in enforcing it.

⁷ THE KALORAMA, 10 Wall. 210-212, 19 L. Ed. 944.

⁸ The Ellen Holgate (D. C.) 30 Fed. 125; The Francis (D. C.) 21 Fed. 715; The Samuel Marshall, 4 C. C. A. 385, 54 Fed. 396.

⁹ The Emily Souder, 17 Wall. 666, 21 L. Ed. 683; THE J. E. RUMBELL, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

¹⁰ The Emily Souder, 17 Wall. 666, 21 L. Ed. 683.

As between the original parties, the claim would hold by analogy until a personal suit of the same nature would be barred by the act of limitations, in the absence of special circumstances, such as loss of evidence or changed condition of parties. But, where other interests have been acquired in ignorance of its existence, it would be held stale in a much shorter period, depending on the frequency of opportunities for enforcing it.¹¹

Illustrations of such interests would be an innocent purchaser for value or a subsequent supply claim. A holder of a mortgage to secure a subsequent debt is a purchaser for value, but not to secure an antecedent debt.¹² As against innocent purchasers, even as short a delay as three months in enforcement, where there was ample opportunity, has been held to render a claim stale.¹³ In older days, when voyages were longer, they were often held stale after one voyage.¹⁴ On the Lakes, the limit, in the absence of special circumstances, is one season of navigation.¹⁵ In short, the time varies according to the opportunity of enforcement, the change in the situation of the parties, and the hardship occasioned or avoided by enforcing it or denying it.¹⁶ The supply man acquires his right against the vessel, not only by furnishing necessities in his own port, but by shipping them to the vessel in another port.¹⁷

¹¹ *THE SARAH ANN*, 2 Sumn. 206, Fed. Cas. No. 12,342; *The Key City*, 14 Wall. 653, 20 L. Ed. 896; *The Queen* (D. C.) 78 Fed. 155.

¹² *THE CHUSAN*, 2 Story, 455, Fed. Cas. No. 2,717; *The Ella* (D. C.) 84 Fed. 471.

¹³ *Coburn v. Insurance Co.* (C. C.) 20 Fed. 644.

¹⁴ *The General Jackson*, 1 Spr. 554, Fed. Cas. No. 5,314.

¹⁵ *The Hercules*, 1 Spr. 534, Fed. Cas. No. 6,401; *The Nebraska*, 17 C. C. A. 94, 69 Fed. 1009.

¹⁶ *The Harriet Ann*, 6 Biss. 13, Fed. Cas. No. 6,101; *The Eliza Jane*, 1 Spr. 152, Fed. Cas. No. 4,363; *THE CHUSAN*, 2 Story, 455, Fed. Cas. No. 2,717; *The Thomas Sherlock* (D. C.) 22 Fed. 253; *The Tiger* (D. C.) 90 Fed. 826.

¹⁷ *The Marion S. Harris*, 29 C. C. A. 428, 85 Fed. 798.

Advances.

Not only the supply man can proceed against the vessel, but any one who advances money on the credit of the vessel, express or implied, for the purpose of paying for such necessities, has a claim against the vessel. In other words, advances of money under such circumstances are necessities.¹⁸ Of course, money lent to the master or owner without reference to the ship, or money advanced to pay off claims not maritime, cannot be collected by suit against the vessel.¹⁹

SAME—"NECESSARIES" DEFINED.

48. "Necessaries," in this connection, mean whatever is fit and proper for the service on which a vessel is engaged. Whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term, as applied to those repairs done or things provided for the ship by order of the master.

Care must be taken to consider the meaning of the term "necessaries," as used in connection with this doctrine of supplies and repairs. In a broad sense of the word, anything is necessary for the ship which tends to facilitate her use as a ship or to save her from danger. In that sense seaman's wages, towage, salvage, and all the other things which come under the admiralty jurisdiction would be necessary. But this is not the meaning when used in connection with supplies and repairs. If it were, then, as necessities furnished a domestic vessel are the basis of a claim against the vessel only when the state statute gives it, that

¹⁸ The *Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; The *Guiding Star* (C. C.) 18 Fed. 263.

¹⁹ The *A. R. Dunlap*, 1 Low. 350, Fed. Cas. No. 513.

would put it in the power of the state legislature to create or take away some of the most ancient grounds of jurisdiction in admiralty. In the sense in which the word is now being used, it is always associated with supplies and repairs, and it means merely such things of that general nature as are fit and proper for the use of the ship. It is not used in as strong a sense as its colloquial meaning would imply. It does not mean essential, but merely fit and proper. Whatever is fit and proper for the use of a vessel as a profitable investment, and would have been ordered by a prudent owner if present, comes within the term.¹

The definition given in the black-letter heading is that of Lord Tenterden in the case of *Webster v. Seekamp*.² It is adopted by Sir Robert Phillimore in the case of *The Riga*,³ which may be noted as a leading case on the subject. It is defined by Judge Dyer to mean "those things which pertain to the navigation of the vessel, and which are practically incidental to, and connected with, her navigation."⁴

It is wider in its meaning than when used by the common-law courts in reference to the contracts of infants. For instance, supplies to the restaurant of a passenger steamer have been allowed.⁵ And Judge Benedict has carried the principle so far as to hold that liquor furnished to the bar of a passenger steamer comes under the same head, as "supplying the ordinary wants of the class of passengers transported on the boat."⁶ It includes muskets or arms to protect a vessel from pirates.⁷ It has been held to include pro-

§ 48. ¹ *THE GRAPESHOT*, 9 Wall. 129, 19 L. Ed. 651.

² 4 Barn. & Ald. 352.

³ L. R. 3 Adm. & Ecc. 516.

⁴ *Hubbard v. Roach*, 9 Biss. 375, 2 Fed. 393.

⁵ *The Plymouth Rock*, 13 Blatchf. 505, Fed. Cas. No. 11,237.

⁶ *The Long Brauch*, 9 Ben. 89, Fed. Cas. No. 8,484; *The Mayflower* (D. C.) 39 Fed. 42.

⁷ *Weaver v. The S. G. Owens*, 1 Wall. Jr. 359, Fed. Cas. No. 17,310.

visions, money, rope, life-preservers, chronometers, and nets for a fishing vessel.⁸

This doctrine is analogous to the supply lien given by section 2485 of the Virginia Code to those who furnish supplies to corporations. In the case of *Fosdick v. Schall*,⁹ the supreme court had decided that men who furnished supplies to a railroad necessary to keep it going had a lien on the income prior to a previous mortgage, thus overturning common-law ideas, and ingrafting an admiralty principle upon chancery law. Section 2485 of the Code and similar statutes of other states have adopted it as a part of our statute law.

SAME—NECESSARIES FURNISHED DOMESTIC VESSELS.

49. For supplies or other necessities furnished a domestic vessel there is no implied lien unless there is a local statute giving it.

As in such cases the owner is accessible, the reason for giving the master power to bind the vessel ceases, and hence the court decided early in its history that in case of supplies to domestic vessels the credit was presumptively given to the owner, and not to the vessel.¹

Validity of State Statutes Giving Such Liens.

In the course of the opinion the court intimated that if a state statute gave a right against the vessel in such cases they might enforce it. Acting upon the hint, many states

⁸ *The Ellen Holgate* (D. C.) 30 Fed. 125; *The Ludgate Hill* (D. C.) 21 Fed. 431; *The Belle of the Coast*, 19 C. C. A. 345, 72 Fed. 1019; *The Georgia* (D. C.) 32 Fed. 637; *The Hiram R. Dixon* (D. C.) 33 Fed. 297.

⁹ 99 U. S. 235, 25 L. Ed. 339.

§ 49. ¹ *THE GENERAL SMITH*, 4 Wheat. 443, 4 L. Ed. 609.

passed acts giving rights of action in rem against domestic vessels, and even authorized their own courts to enforce them.

The federal constitution, in conferring admiralty jurisdiction upon the federal courts, provided that it should be exclusive. And the judiciary act of 1789, carrying into effect this constitutional provision, conferred this jurisdiction in the first instance on the district courts, but added a clause saving to the common-law courts all remedies which the common law was competent to give. Hence the courts had to decide that those state enactments which purported to bestow on their courts jurisdiction in rem to enforce a maritime right were unconstitutional. This principle, however, only applied to proceedings in rem pure and simple. For instance, an act which gave seamen a right to sue the owner for their wages in a state court was held not a proceeding in rem, even though accompanied by an attachment; for it was still against the owner by name, not against the vessel by name, and the attachment was only an incident.² On the other hand, a statute authorizing a proceeding in rem directly against the vessel, in which any notice to the owners was only an incident, and only given if known, was held unconstitutional.³

But, though the courts decided that state legislation could not confer on state courts the right to enforce an admiralty claim against a vessel by pure proceedings in rem, they also decided that, as it was in its nature a maritime cause of action, the United States courts could enforce it. In other words, the effect of these decisions was that a state statute could create a right to proceed in rem on a maritime cause of action where none had previously existed, and that the federal courts, finding such a maritime right in existence, no matter how it arose, would enforce it.

² *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74.

³ *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296.

The Twelfth Admiralty Rule.

The supreme court went further than this. By the act of August 23, 1842, congress had conferred upon it power to prescribe the forms and modes of process and proceeding and the practice generally in equity and admiralty for the federal courts of original jurisdiction. Acting under this authority, the court at December term, 1844, promulgated the admiralty rules, which are still in force, and furnish an admirable code of pleading and practice.

The twelfth of these rules provided: "In all suits by material men for supplies or repairs, or other necessities, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in rem shall apply to cases of domestic ships, where, by the local law, a lien is given to material men for supplies, repairs or other necessities."

This was a mere affirmation of the then existing practice. It remained in this form until 1859, when the court, impressed by the diversity in the state statutes which it had undertaken to recognize, amended it so as to read as follows: "In all suits by material men for supplies, or repairs, or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in personam, but not in rem, shall apply to cases of domestic ships, for supplies, repairs, or other necessities."

The effect of this was to take away the right to proceed in rem for necessities furnished to domestic vessels, even though given by a state statute. And in the case of *The St. Lawrence*,⁴ decided soon afterwards, Chief Justice Taney justified this action by saying that the question whether a creditor should proceed in rem or in personam

⁴ 1 Black, 522, 17 L. Ed. 180.

to enforce a maritime right was a mere question of procedure, which the court might allow or abolish at its pleasure. This rule remained in this form till May 6, 1872, when the court again amended it so as to read as follows: "In all suits by material men for supplies or repairs or other necessities, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam." The effect of this was to give exactly the same procedure in the case of domestic and foreign vessels.

It does not mention the existence of a state statute as requisite to the enforcement of a lien against a domestic vessel. If, as Justice Taney says, it is a mere question of procedure which the court can give or take away at will, it is difficult to see why the language of this rule does not give the right independent of state statutes, though the decisions have settled that in case of domestic vessels it is only enforced when given by a state statute. But, in the great case of *THE LOTTAWANNA*,⁵ Mr. Justice Bradley said that a right to proceed in rem was not a mere right of procedure, but a right of property which the court by rule could not give or take away, and that the amendment of 1872 was not intended to give any lien, but merely to remove all impediments in enforcing such as already existed. This being so, the kaleidoscopic changes of the twelfth rule have only created confusion. If there had never been any twelfth rule, the result as settled by the late decisions would be the same. Prior to its enactment in 1844, the right given by state statutes had been enforced, and to-day the rule, as construed by its makers, creates no new right, but merely removes impediments in enforcing a right already existing.

The fact is that the whole doctrine is unsatisfactory and illogical in its development. Its difficulties commenced when the court, following the narrow views of the English

⁵ 21 Wall. 558, 22 L. Ed. 654.

law, denied that any right of procedure in rem existed in the case of domestic vessels. The increasing needs of modern commerce demanded such liens, and the court has allowed them at last, and reached the true goal, but by a devious path. Any one who reads the dissenting opinion of Mr. Justice Clifford in *THE LOTTAWANNA CASE* will be convinced that by the general principles of maritime law there was no distinction between foreign and domestic vessels, and that it would have saved much confusion and litigation if the court had promptly come out and corrected its error, as it did on the tide-water question.

Mr. Justice Bradley, in the majority opinion of that same case, is forced to say that this idea of a state giving an additional remedy to an admiralty contract and of a federal court recognizing and enforcing it is anomalous. He attributes it to the fact that the state admiralty courts prior to the constitution recognized and enforced it, and that the new federal judges, many of whom had been state judges, continued the same jurisdiction, without recognizing their altered relations.

Perhaps a stronger reason is that state statutes only incidentally affecting commerce, like pilotage laws, quarantine laws, and laws authorizing bridges over navigable streams, have been upheld as valid in the absence of legislation by congress, and that these statutes belong to the same category.⁶

At the same time it must be remembered that the admiralty jurisdiction is not dependent upon the commerce clause of the constitution, but is derived from an entirely different one.⁷ The history and changes of the twelfth admiralty rule may be traced in the cases stated in the footnote.⁸ As the

⁶ 21 Wall. 581, 582, 22 L. Ed. 664.

⁷ Const. art. 3, § 2; *EX PARTE GARNETT*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.

⁸ *THE GENERAL SMITH*, 4 Wheat. 443, 4 L. Ed. 609; *The St. Lawrence*, 1 Black, 522, 17 L. Ed. 180; *The Circassian*, Fed. Cas. No.

right arises from a state statute, the provisions of the state statute as to recording, time of enforcement, etc., are binding. But in *THE J. E. RUMBELL*, supra, Mr. Justice Gray strongly intimated that, as it was enforced on the theory of its being a maritime right, it took precedence of non-maritime rights in the teeth of the state provisions.

In general, this right against domestic vessels is governed by the principles which apply in case of foreign vessels. It is prior to nonmaritime liens; it is not waived by taking a note; it becomes stale usually in less time than in case of foreign vessels, as it is more easily enforceable; it is given for advances, and for things not merely necessary, but fit and proper.

SAME—DOMESTIC LIENS AS AFFECTED BY OWNER'S PRESENCE.

50. The better opinion is that in case of domestic vessels also the presumption is against a lien if the supplies are ordered by the owner or by the master when the owner is in the port.

There is great conflict of decision on the question whether the doctrine above explained in relation to foreign vessels, that the presence of the owner defeats the lien, and that there is no claim against the vessel unless there is an express understanding, applies to liens on domestic vessels created by a state statute. There is much respectable authority for the proposition that where the statute uses general terms, and says nothing about the necessity of an express understanding, the lien will arise by virtue of the provisions of the statute itself. And so, in the case of *The Alvira*,¹ Judge Mor-

2,720a; *THE LOTTAWANNA*, 21 Wall. 558, 22 L. Ed. 654; *THE J. E. RUMBELL*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

§ 50. ¹ (D. C.) 63 Fed. 144.

row held that, though domestic liens were generally similar to foreign liens, this principle did not apply to liens in the home port, as it would defeat the lien entirely. This same doctrine was held by Judge Hanford in the case of *McRae v. Bowers Dredging Co.*; ² and, in the still later case of *The Iris*,³ Judge Putnam, speaking for the circuit court of appeals of the First circuit, held that a lien existed by virtue of the Massachusetts statute, even though there was no express understanding for a lien.

But, notwithstanding this respectable and formidable array of authority, the better doctrine would seem to be that as to domestic liens also, where the contract was made with the owner, or with the master when the owner was present or easily accessible, there should not be a lien without some understanding beyond the mere fact of ordering the supplies.

It is unfortunate that there should have ever been any distinction between domestic and foreign liens at all, and it is equally desirable that no unnecessary distinctions should be created between them. It is not a hard thing to have such an understanding if the mechanic wishes to protect himself. It is at best frequently a hardship to enforce these liens as against third parties, and it is believed that in general justice will better be done by having domestic and foreign liens as similar as possible.

This question came up in the case of *The Samuel Marshall*,⁴ where Judge Taft, speaking for the circuit court of appeals of the Sixth circuit, refused to enforce such a lien in the absence of some understanding, although the language of the Michigan statute was amply broad to have given it. He very aptly says, in speaking of these very generally and vaguely worded statutes, that the character of the lien created was presumably intended to be such that a res-

² (C. C.) 86 Fed. 344.

³ 40 C. C. A. 301, 100 Fed. 104.

⁴ 4 C. C. A. 385, 51 Fed. 396.

ident of the home port of the vessel would be put on an equality in respect to the lien to be secured with the citizens of a foreign state; that they were providing a maritime lien, and intended that it should have the peculiar characteristics of a maritime lien. He quotes with approval the decision of Mr. Justice Matthews and Judge Baxter in *The Guiding Star*.⁵ In the case of *The Electron*,⁶ Judge Shipman, speaking for the circuit court of appeals of the Second circuit, held the same way.

In fact, this seems to follow necessarily from the decision of the supreme court in the case of *The Kate*.⁷ There the New York statute which was before the court used very general language, which, literally construed, would have created a lien when ordered by anybody, even a charterer. The district court had held that the New York statute, in spite of this general language, presupposed some express or implied authority, and that the statute, literally construed, would be unconstitutional. The supreme court, without passing upon the constitutional question, held that such a statute could not be so widely construed, and it refused to sustain a lien created by the charterer, in spite of the general language of the statute.

At one time it was thought that, among admiralty claims of otherwise equal dignity, the one first asserted by libel would be paid in preference to the others, but the later authorities have settled that the prior petens gains nothing by his diligence.⁸

⁵ (C. C.) 18 Fed. 263.

⁶ 21 C. C. A. 12, 74 Fed. 689.

⁷ 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512.

⁸ *Saylor v. Taylor*, 23 C. C. A. 343, 77 Fed. 476, post, p. 351.

SAME—SHIPBUILDING CONTRACTS.

- 51. A contract for building a ship is not maritime, and hence cannot be enforced in the admiralty, nor can it be made so by a state statute. Such a statute, however, can give a remedy to the state courts for its enforcement.**

It will be observed that the theory on which these state liens are enforced is that they are maritime in their nature. But a state cannot make a contract maritime which is not in its nature maritime, nor attach a maritime lien to a non-maritime cause of action. For this reason a state statute cannot create a right to proceed in the admiralty to enforce a contract for building a ship, as the courts have held these contracts not marine in their nature. This was first decided by the supreme court in the case of *People's Ferry Co. of Boston v. Beers*.¹ The ground of the decision is that such contracts have no reference to any voyage, that the vessel is then neither registered nor licensed as a seagoing ship, that it is a contract made on land to be performed on land, and therefore nonmaritime.

This decision was during a period when the supreme court was leaning against the extension of admiralty jurisdiction. It has long repudiated any dependence on the commerce clause for admiralty jurisdiction.² And the argument that it was made on land, to be performed on land, smacks of the most bigoted period of English common-law jealousy. It is a test no longer insisted on; for it would debar from the admiralty courts all coppersmithing, painting, or calking on marine railways or in dry docks, and even salvage contracts to float a stranded vessel.

§ 51. 1 20 How. 393, 15 L. Ed. 961.

² *EX PARTE GARNETT*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.

A shipbuilding contract is not entirely to be performed on land. Graceful as a ship may be when she first floats upon her destined element, she is a mere hulk. Her masts, her sails, her anchors, and general outfit are all added after she is afloat. It might as well be said that a bill of lading signed in an agent's office, and representing cotton alongside a ship in the sheds subject to her order, is a contract made on land, to be performed on land. Under the general maritime law, shipbuilding contracts were maritime.³

But, however it may be on principle, the law is settled that such contracts are not maritime in their character. This being so, it necessarily followed that a state statute could not make them maritime, and so the court soon held.⁴

As the limitation upon these statutes is simply that they shall not interfere with the exclusive jurisdiction of the admiralty, it follows that any lien or special process given to enforce any nonmaritime right is valid; and therefore the supreme court has upheld a special remedy conferred by a state statute upon a state court to enforce a shipbuilding contract, for the very reason that it is not maritime.⁵

The Virginia statute on this subject is found in section 2963 of the Code, and reads as follows: "If any person has any claim against the master or owner of any steamboat or other vessel, raft or river craft, or against any steamboat or vessel, raft or river craft, found within the jurisdiction of this state, for materials or supplies furnished or provided, or for work done for, in, or upon the same, or for wharfage, salvage, pilotage, or for any contract for transportation of, or any injury done to any person or property by such steamboat or other vessel, raft, or river craft, or by any person having charge of her, or in her employment, such person shall have a lien upon such steamboat or other vessel, raft, or river craft, for such materials or supplies furnished, work

³ Ben. Adm. § 264.

⁴ *Rouch v. Chapman*, 22 How. 129, 16 L. Ed. 291.

⁵ *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487.

done, or services rendered, wharfage, salvage, pilotage, and for such contract or injury as aforesaid; and may, in a pending suit, sue out of the clerk's office of the circuit court of the county, or in the circuit or corporation court of the corporation, in which such steamboat or other vessel, raft or river craft, may be found, an attachment against such steamboat or other vessel, raft, or river craft, with all her tackle, apparel, furniture, and appurtenances, or against the estate of such master or owner. Any attachment may be sued out under this section for a cause of action that may have arisen without the jurisdiction of this state, as well as within it, if the steamboat or other vessel, raft, or river craft, be within the jurisdiction of this state at the time the attachment is sued out or executed."

This is one of the sections in the chapter regulating attachments. As it does not provide a proceeding in rem, but merely an attachment in a "pending suit" against the owner, a proceeding under it in the state courts, even on a maritime cause of action, could be sustained.

SAME—VESSELS AFFECTED BY STATE STATUTES.

52. The better opinion is that state statutes create this lien only on domestic vessels, and that the rights of material men against foreign vessels depend upon the general maritime law.

As stated above, the distinction between supplies furnished to domestic vessels and to foreign vessels is largely artificial, and it is to be regretted that it was ever made. The symmetry of marine law requires that the general doctrine be modified as little as possible. If state statutes can regulate not only claims against domestic vessels, but against foreign vessels, they can add liens to maritime causes of action that did not exist before, and take them away where they did

exist. Consequently, a foreign vessel would find a different law in every port. It would certainly seem more consistent with principle to hold, as is historically true, that the sole purpose and object of these state laws were to put domestic vessels on the same footing as foreign vessels. The converse of this, that they can reduce foreign vessels to the basis of domestic vessels, would be a great anomaly. Accordingly, the best-considered decisions have held that the maritime rights of foreign vessels are independent of these state statutes (as an attempt to regulate them would be to interfere with the general admiralty jurisdiction), and that these statutes regulate only rights against domestic vessels.

The leading case on the subject is *THE CHUSAN*.¹ In it Mr. Justice Story says: "The statute is, as I conceive, perfectly constitutional as applied to cases of repairs of domestic ships; that is, of ships belonging to ports of that state. And if the present were the case of materials and supplies furnished to a ship belonging to New York, and the lien were sought to be enforced in the admiralty courts of the United States, I should have no doubt that the lien created by the law of that state, and not existing by the general maritime law, must be governed throughout by the law of that state, and that, when the ship left the state, it should cease. But in cases of foreign ships, and the supplies furnished to them, the jurisdiction of the courts of the United States is given by the constitution and laws of the United States, and is in no sense governed, controlled, or limited by the local legislation of the respective states. The constitution of the United States has declared that the judicial power of the national government shall extend to all cases of admiralty and maritime jurisdiction; and it is not competent for the states, by any local legislation, to enlarge, or limit, or narrow it. In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively

governed by the legislation of congress, and, in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have the right to prescribe all rules, to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least, as far as I have any knowledge, either by any state court, or national court, within the whole Union. * * * Suppose a state legislature should declare that there should in future be no lien of seamen for their wages, on any ship, foreign or domestic, or no lien for salvage on any ship, foreign or domestic; and no lien for any bottomry on a ship, foreign or domestic; will it be pretended that such a law would be obligatory upon the courts of the United States in the exercise of admiralty and maritime jurisdiction? If it would be, a more forcible and complete device to dry up and extinguish the jurisdiction of the courts of the United States in admiralty cases could scarcely be imagined. The truth is, that the admiralty and maritime jurisdiction of the courts of the United States, given by the constitution, covers not merely the cognizance of the case, but the jurisdiction and principles by which it is to be administered. It covers the whole maritime law applicable to the case in judgment, without the slightest dependence upon or connection with the local jurisprudence of the state on the same subject. The subject-matter of admiralty and maritime law is withdrawn from state legislation, and belongs exclusively to the national government and its proper functionaries. Besides, by the constitution of the United States, congress has the power to regulate commerce with foreign nations and among the sev-

eral states. The power to regulate commerce includes the power to regulate navigation with foreign powers and among the states, and it is an exclusive power in congress."

This has been followed by Judge Brown in *The Lyndhurst*,² and by the circuit court of appeals for the Second circuit in *The Electron*.³

On the other hand, Judge Hanford, in an equity case in the circuit court,⁴ where he was marshaling various assets of an insolvent corporation, held that the statute of Washington applied to foreign, as well as domestic, vessels. And in the later case of *The Del Norte* ⁵ he held that state statutes could create such liens even on foreign vessels, as the contract was one within the state, and was governed by the *lex loci contractus*.

It is, of course, true that a state statute can regulate the general course of transactions between the parties within the limits of the state, but it must do so subject to constitutional provisions. To illustrate this more clearly, such a statute can create a lien against a vessel for building within the state, as that is a matter for the *lex loci contractus*, but it cannot go a step further, and make that an admiralty lien. So it may regulate the evidence required to prove such claims, but all of its legislation sustainable on this ground must still be subject to the federal constitution, which confers admiralty jurisdiction upon the federal courts alone. To say that a state legislature can pass a statute regulating liens upon foreign vessels is to say that it can defeat them or add to them at pleasure, so long as the subjects are maritime in their character. As Mr. Justice Story has well said in *THE CHUSAN*, the consequence of this would be to place the admiralty jurisdiction entirely at the mercy of the state statutes, and it is believed that, when the question is

² (D. C.) 48 Fed. 839.

³ 21 C. C. A. 12, 74 Fed. 689.

⁴ *McRae v. Dredging Co.* (C. C.) 86 Fed. 344.

⁵ (D. C.) 90 Fed. 596.

presented to the supreme court in such manner as to render its decision necessary, it will hold that these statutes only apply to the rights of material men against domestic vessels. In the case of *The Kate*,⁶ the court was confronted with this question, but did not decide it, as the case went off on another ground.

The reasoning of the court on a somewhat similar question, in the case of *Workman v. City of New York*,⁷ forcibly shows the inconvenience and danger of the doctrine that state statutes can control the general maritime law, though the case is not sufficiently in point to settle the question.

⁶ 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512.

⁷ 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

CHAPTER V.

OF STEVEDORES' CONTRACTS, CANAL TOLLS, AND TOWAGE CONTRACTS.

- 53. Stevedores' Contracts—"Stevedore" Defined.
- 54. Maritime Character of Contracts, and Liens on Foreign and Domestic Vessels.
- 55. Privity of Contract Necessary to Lien.
- 56. Canal Tolls.
- 57. Towage—"Service" Defined.
- 58, 59. Responsibility as between Tug and Tow.
- 60. Degree of Care Required of Tug.
- 61. For Whose Acts Tug or Tow Liable.

STEVEDORES' CONTRACTS—"STEVEDORE" DEFINED.

- 53. A stevedore is a workman or contractor who loads or discharges a ship and properly stows her cargo.

SAME—MARITIME CHARACTER OF CONTRACTS, AND LIENS ON FOREIGN AND DO- MESTIC VESSELS.

- 54. A contract for such service is maritime, and gives a lien certainly on foreign vessels, certainly on domestic vessels where a state statute gives it, and probably on domestic vessels even in the absence of a state statute.

The services of a stevedore are essential to the financial success of a ship. The modern ship is intricate and complicated in her cargo spaces, and it requires the skill of an

expert to load her to advantage. He must not only know how best to stow the cargo without loss of space, but also how to arrange it so as to trim her properly, putting the heavy nearest the bottom so as not to make her crank; and he must work with rapidity, for the demurrage of large vessels amounts to hundreds of dollars a day, and every delay means heavy loss. In view of the narrow margin on which business is conducted nowadays, the proper stowage of the cargo makes all the difference between a profit and a loss.

In view of the importance of these services, it is difficult to understand how its maritime character could ever have been questioned, yet until recently the preponderance of authority was against it. The probable explanation is that, when vessels were small, no great skill was required, and the loading was mainly done by the crew themselves.

In *The Amstel*,¹ Judge Betts denied the maritime character of the service on the ground that it was partly to be performed on land, and was no more connected with the good of the vessel than a man who hauls goods to the wharf, and many cases follow this decision without question.

But it has already been seen that in matters of contract the test is the character of the service, and not its locality. Accordingly, in *THE GEORGE T. KEMP*,² Judge Lowell held that such services were maritime, and gave the stevedore a right to hold the vessel itself, at least if she was a foreign vessel, and this has been followed in many later cases.

A large number of these cases hold that, although the service is maritime, the stevedore has his remedy in rem only against a foreign ship, or against a domestic ship where there is a state statute giving it. A typical case drawing this distinction is *The Gilbert Knapp*.³ It is a good illus-

§§ 53-54. 11 Blatchf. & H. 215, Fed. Cas. No. 339.

² Fed. Cas. No. 5,341.

³ (D. C.) 37 Fed. 209.

tration of the confusion caused in marine law by the distinction drawn between foreign and domestic vessels in connection with the doctrine of the rights of material men. The cases which hold that a stevedore has no lien upon a domestic vessel compare his work and character to that of a material man and follow those analogies. Most of these cases, when examined, will appear to be cases where the vessel actually was a foreign vessel, and where this qualification was put in by the judge, not as a decision, but merely as a cautious reservation which might protect him in future.⁴

But the better opinion would seem to be that a stevedore is more like a sailor than a material man. The duties now performed by him under modern demands are the same as those that sailors used to perform. No one has ever supposed that a sailor had no lien on a vessel unless given by a state statute, and it is difficult to see why this distinction should be dragged in as against a stevedore. Accordingly, in *THE SEGURANCA*,⁵ Judge Brown reviews this question, holds that a stevedore is more like a sailor than he is like a material man, and decides that he ought to have a lien even in the home port, just as a sailor would have.

SAME—PRIVITY OF CONTRACT NECESSARY TO LIEN.

55. This being a lien arising from contract, only those are entitled to it who have a contract with the vessel.

It is not at all like a subcontractor's lien under a state mechanic's lien law. Hence, if a vessel employs a stevedore

⁴ See, as illustrations, *The Main*, 2 O. C. A. 569, 51 Fed. 954; *Norwegian S. S. Co. v. Washington*, 6 O. C. A. 313, 57 Fed. 224; *The Scotia* (D. C.) 35 Fed. 916.

⁵ (D. C.) 58 Fed. 908.

to load her, he would have a lien, but the workmen employed by him would not, for their contract would be with him, and not with the vessel. So if a vessel comes under a charter party, by which the charterer is to load her and pay a lump sum for her use, it is no interest of the vessel whether the charterer loads her or not. If he does not, he will have to pay the charter price for her use just the same, and no loss would be entailed upon the vessel, as she would get dead freight. In such case, the charterer would be an independent contractor, and, if he employs a stevedore, the latter would have no contract with the vessel itself, and would have to look to him. On principle, this doctrine is very clear. The only confusion which has arisen under it at all is that frequently the charterer is not only charterer, but agent of the vessel, having authority from the vessel. If the stevedore deals with him in that capacity, and does not know the limitations of his power, or is not so put upon inquiry as to charge him with knowledge, it may sometimes be the case that the vessel will be bound, but the natural presumption would be the other way.¹

The relation between the stevedore and ship is but a branch of the general law of master and servant, and is foreign to the present subject. He is so far the agent of the ship as to bind the ship by his acts, even when the charter party expressly requires the ship to employ the charterer's stevedore, as is frequently the case.²

CANAL TOLLS.

56. Tolls due by a vessel for use of a canal are a maritime contract, and, if a lien is given by state statute, it can be enforced by a libel in

§ 55. ¹ That some privity must be shown in order to sustain right of action against the vessel, see *The Hattie M. Bain* (D. C.) 20 Fed. 389; *The Mark Lane* (D. C.) 13 Fed. 800.

² *The T. A. Goddard* (D. C.) 12 Fed. 174.

rem in admiralty against a domestic vessel, and it can be enforced against a foreign vessel independent of any statute.

In the case of *The St. Joseph*,¹ a corporation was authorized by its charter to improve a navigable stream and charge for the use of the same, and the charter, which was a public one granted by act of the legislature, made these tolls a lien in rem upon the vessel. The court held that the contract was maritime, and could be enforced in admiralty against the vessel.

In the case of *The Bob Connell*,² the court held that a service of this sort was maritime, likened it to the lien of a material man, and held that it could be enforced against a domestic vessel if there was a state statute, and not if there was no statute.

In both these cases, therefore, the question of the state statute was necessarily involved. Under the principles already discussed, it would seem clear that, even if there was no statute, such a claim could be enforced against a foreign vessel.

TOWAGE—"SERVICE" DEFINED.

57. Towage is a service rendered in the propulsion of uninjured vessels under ordinary circumstances of navigation, irrespective of any unusual peril.

Of recent years this has become a topic of steadily increasing importance. The saving of time and diminution of risk accomplished by the use of tugboats has caused every harbor to be thronged with them, from the wheezing little high-pressure tugboat that pulls watermelon sloops and oyster pungies, to the magnificent ocean-going triple expan-

§ 56. ¹ Fed. Cas. No. 12,230.

² (C. C.) 1 Fed. 218.

sion tugs, equipped with machinery, bitts, and hawsers strong enough to tow a fleet. Their services are not limited to towing sail vessels, but in contracted harbors the long, narrow modern steamers, in turning or docking, do not disdain their aid.

It is often hard to draw the line between a towage and a salvage service. As near as it can be drawn, the distinction would seem to be that when a tug is taken by a sound vessel, as a mere means of saving time or from considerations of convenience, the service would be classed as towage, while if the vessel is in any way disabled and in need of assistance, to escape actual or possible risk the service is a salvage service, of a high or low merit according to the special circumstances.*

Indeed, a service may start as towage and end as salvage. For instance, a tug starts to tow a vessel from one point to another under contract for a certain sum. The towage contract is presumed to cover only the ordinary incidents of the voyage. If a tempest arises of sufficient severity to greatly endanger or to disable the tow, the towage contract is abrogated by the *vis major*, and the tug may claim salvage, provided, of course, she has not been negligent in unnecessarily exposing her tow, or bringing about the dangerous situation.¹

§ 57. * See the following cases for the distinction between towage and salvage: *The Reward*, 1 W. Rob. 174; *The Princess Alice*, 3 W. Rob. 138; *The Emily B. Souder*, 15 Blatchf. 185, Fed. Cas. No. 4,458; *The J. C. Pfluger* (D. C.) 109 Fed. 93.

¹ *The H. B. Foster*, Fed. Cas. No. 6,290; *The Minnehaha*, Lush. 335; *The Madras* [1898] Prob. Div. 90.

**SAME—RESPONSIBILITY AS BETWEEN TUG AND
TOW.**

58. The tow is not liable for the tug's acts where the latter directs the navigation.

59. It is liable for its own negligence, and may be for the tug's, where it directs the navigation.

The relation between tug and tow, under the American decisions, under ordinary circumstances, is that of independent contractor, not that of principal and agent. In other words, the tug is not the servant or employé of the tow, and therefore the tow is not responsible for the acts of the tug. Hence, if the tow collide with some vessel during the voyage, it is not liable for the damage caused thereby, unless some negligence contributing to the collision is proved against the tow. The law is well summarized in the case of *STURGIS v. BOYER*,¹ where the court says: "Looking at all the facts and circumstances of the case, we think the libelants are clearly entitled to a decree in their favor; and the only remaining question of any importance is whether the ship and the steam tug are both liable for the consequences of the collision, or, if not, which of the two ought to be held responsible for the damage sustained by the libelants. Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible, as when the tug is employed by the master or owner of the tow as the mere motive power to propel

§§ 58-59. ¹ 24 How. 110, 16 L. Ed. 591. See, also, *The Clarita*, 23 Wall. 1, 23 L. Ed. 146.

their vessels from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and, if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons, suffering damages through the fault of those in charge of the vessel, must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf that a part, or even the whole, of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conduct-

ing it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. "Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug or ship the crew, nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation."

The courts hold the relation between tug and tow to resemble that between the hirer and driver of a livery-stable carriage. The hirer merely designates the destination, and

as the driver is not employed or selected by him, but by the livery-stable keeper, the hirer is not liable for his acts.²

The English courts seem more inclined to regard the tug as the servant of the tow, and to hold the tow liable for the tug's negligence.³

But the difference between the American and English decisions is more apparent than real. The statements of facts in the English cases show that it is a more usual practice in England to have the master of the tow direct the navigation of both vessels. In such case, the negligence would be that of the tow rather than the tug, and so the English courts have settled upon the doctrine that the question whether the tug is the agent of the tow or an independent contractor is a question dependent upon the special circumstances of each case.⁴

The relative duties of tug and tow are well explained in the case of *DUTTON v. THE EXPRESS*.⁵ If the tow is fastened alongside the tug, and the tug has full charge of the navigation, then the liability for a collision would be upon the tug. If the tow is towing at the end of a hawser, the liability would be upon the tug if the tow steered properly, and would be upon the tow if the proximate cause of the collision was wild steering on her part. Even if she was steering properly, and the tug steered her right into danger, she would be responsible to the injured vessel if by changing her helm or taking any other reasonable precautions she could avoid the consequences of the tug's negligence, for it would be her duty to avoid collision if she could do so. It is also the duty of the tow to arrange the hawser at her end.⁶

² *Quarman v. Burnett*, 6 Mees. & W. 499.

³ *The Niobe*, 13 Prob. Div. 55; *The Isca*, 12 Prob. Div. 34.

⁴ *The Quickstep*, 15 Prob. Div. 196; *The America*, L. R. 6 P. C. 127; *Smith v. Towboat Co.*, L. R. 5 P. C. 308.

⁵ 3 Cliff. 462, Fed. Cas. No. 4,209.

⁶ *The Isaac H. Tillyer* (D. C.) 101 Fed. 478; *The America*, 42 C.

SAME—DEGREE OF CARE REQUIRED OF TUG.

60. A tugboat is not a common carrier, and is liable only for lack of ordinary care, as measured by prudent men of that profession.

There are some early decisions to the effect that a tugboat is a common carrier, but the later authorities have settled thoroughly that it is not, but only an ordinary bailee, liable for ordinary negligence. It is also settled that the mere occurrence of an accident raises no presumption against the tug, and that the burden is on the complaining party to prove a lack of ordinary care.¹ At the same time, the ordinary care required of those engaged in the profession of towing is a high one, for they hold themselves out as experts. The measure of care required is similar to that required of pilots. In fact, they are pilots.²

As an expert, a tugboat man must know the channel and its usual currents and dangers, and the proper method of making up tows. He is liable for striking upon obstructions or rocks in the channel which ought to be known to men experienced in its navigation, but not for those which are unknown. He is required to have such knowledge of weather indications as experienced men of his class are supposed to have, though it would not be negligence in him to start to sea with his tow where the weather bureau predicted good weather. Nor would it be negligence to start on inland nav-

C. A. 617, 102 Fed. 767; *The Virginia Ehrman*, 97 U. S. 309-315, 24 L. Ed. 890; *The Imperial* (D. C.) 38 Fed. 614, 3 L. R. A. 234; *Pederson v. Spreckles*, 31 C. C. A. 308, 87 Fed. 938.

§ 60. ¹ *EASTERN TRANSP. LINE v. HOPE*, 95 U. S. 297, 24 L. Ed. 477; *The A. R. Robinson* (D. C.) 57 Fed. 667; *The W. H. Simpson*, 25 C. C. A. 318, 80 Fed. 153; *The Lady Wimett* (D. C.) 92 Fed. 399; *Id.*, 40 C. C. A. 212, 99 Fed. 1004.

² *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The Mount Hope*, 29 C. C. A. 365, 84 Fed. 910; *The Syracuse* (D. C.) 84 Fed. 1005.

igation merely because the weather bureau indicated storms at sea.³

A tugboat man who contracts to perform a service impliedly warrants that his tug is sufficiently equipped and efficient to perform the service, though he would not be liable for any breakdown arising from causes which ordinary care could not have discovered and prevented.⁴

SAME—FOR WHOSE ACTS TUG OR TOW LIABLE.

- 61. A tug and tow are liable, either in contract or in tort, only for the acts and defaults of those who are the lawful agents or representatives of their owners.**

Hence, if a charterer employs a tug to tow his vessel, and under the terms of the charter party he has no right to bind the vessel for such contracts and this is known to the party dealing with him, the vessel would not be liable for the tow bill. So, too, if the tug at the time is in the hands of parties who have no right to her use, she would not be liable in rem for torts committed or contracts made by them.¹

A towage contract is pre-eminently maritime, and may be enforced against the tug.²

³ *The Belle*, 35 C. C. A. 623, 93 Fed. 833; *The E. V. McCauley*, 33 C. C. A. 620, 90 Fed. 510; *The Victoria*, 37 C. C. A. 40, 95 Fed. 184.

⁴ *The Undaunted*, 11 Prob. Div. 46; *The Ratata* [1888] App. Cas. 513; *The Ravenscourt* (D. C.) 103 Fed. 668.

§ 61. ¹ *The Mary A. Tryon* (D. C.) 93 Fed. 220; *The Tasmania*, 13 Prob. Div. 110; *The Anne*, 1 Mason, 508, Fed. Cas. No. 412; *The Clarita*, 23 Wall. 11, 23 L. Ed. 146.

² *Ward v. The Banner*, Fed. Cas. No. 17,149; *The Williams*, 1 Brown, Adm. 208, Fed. Cas. No. 17,710; *The Erastina* (D. C.) 50 Fed. 126.

CHAPTER VI.

OF SALVAGE.

- 62. Nature and Grounds.
- 63. "Salvage" Defined—Elements of Service.
- 64. The Award—Amount in General.
- 65. Elements of Compensation and Bounty.
- 66. Incidents of the Service.
- 67. Salvage Contracts.
- 68. Salvage Apportionment.
- 69. Salvage Chargeable as between Ship and Cargo.

NATURE AND GROUNDS.

- 62. Salvage is peculiarly maritime in its nature. It is awarded on grounds of public policy, and is independent of contract.**

This is one of the most interesting branches of marine jurisprudence. It is more purely maritime in its nature than any heretofore discussed. It finds no analogy in the common law, nor, indeed, as far as procedure is concerned, in the chancery law, though it largely partakes of equitable principles in its administration. Both the common-law and chancery courts enforce rights of positive obligation arising either from contract or from a violation of some binding duty which one man owes to another in the organization of modern society. Mere moral claims or duties of imperfect obligation appeal in vain to those courts, no matter how loudly they may knock at their doors.

But the right of salvage depends on no contract, springs from no violation of positive duty. A salvor who rescues valuable ships or cargoes from the remorseless grasp of wind and wave, the cruel embrace of rocky ledges or the devouring flame, need prove no bargain with its owner as

the basis of recovering a reward. He is paid by the courts from motives of public policy,—paid not merely for the value of his time and labor in the special case, but a bounty in addition, so that he may be encouraged to do the like again.

In an early case Chief Justice Marshall well contrasted the doctrines of the common-law and marine courts on the subject: "If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever, if valuable goods be rescued from a house in flames, at the imminent hazard of life, by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea, yet the claim for salvage could not perhaps be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice."¹ This same comparison is well made in the interesting English case of *Falcke v. Insurance Co.*²

While salvage does not necessarily spring from contract, it may do so, and in fact usually does so; the most frequent instances to the contrary being services to derelicts. In modern times the greater use of steamers and better methods of construction render these cases rare, and make nearly all the cases with which we have to deal spring from contract. Hence salvage is classified in this treatise under contract rights, sacrificing logic to convenience. These contracts, as in other branches of the law, may be express or implied. A service rendered to a distressed vessel with the acquiescence of those in charge implies an agreement for payment therefor, even though not a word is said about price.³

§ 62. ¹ *The Blaireau*, 2 Cranch, 239, 2 L. Ed. 266.

² 34 Ch. Div. 234.

³ *Gould v. U. S.*, 1 Ct. Cl. 184; *Bryan v. U. S.*, 6 Ct. Cl. 128.

"SALVAGE" DEFINED—ELEMENTS OF SERVICE.

63. Salvage is the reward allowed for a service rendered to marine property, at risk or in distress, by those under no legal obligation to render it, which results in benefit to the property if eventually saved.

"A Service Rendered."

Space forbids the enumeration of all services that have been held by the courts to be included in these words. The following may be named rather as illustrations than as a catalogue:

- (1) Towage of disabled vessels.¹
- (2) Piloting or navigating endangered ships to safety.²
- (3) Removing persons or cargo from endangered vessel.³
- (4) Saving a stranded ship and cargo.⁴
- (5) Raising a sunken ship or cargo.⁵
- (6) Saving a derelict or wreck.⁶
- (7) Taking aid to a distressed ship or information for her to port.⁷

§ 63. ¹ THE AKABA, 4 C. C. A. 281, 54 Fed. 197; The Chatfield (C. C.) 52 Fed. 479; The Taylor Dickson (D. C.) 33 Fed. 886.

² The Anna, 6 Ben. 166, Fed. Cas. No. 398; The Alamo, 21 C. C. A. 451, 75 Fed. 602; The J. L. Bowen, 5 Ben. 296, Fed. Cas. No. 7,322.

³ The John Wesley, Fed. Cas. No. 7,433; The Sir William Armstrong (D. C.) 53 Fed. 145.

⁴ The Sandringham (D. C.) 10 Fed. 556; The Egypt (D. C.) 17 Fed. 359; The Kimberley (D. C.) 40 Fed. 289.

⁵ The Camanche, 8 Wall. 448, 19 L. Ed. 397; The H. D. Bacon, 1 Newb. 274, Fed. Cas. No. 4,232; The Isaac Allerton, Fed. Cas. No. 7,088.

⁶ The Janet Court [1897] Prob. Div. 59; The Thos. W. Haven (D. C.) 48 Fed. 482; The Sybil, 5 Hughes, 61, Fed. Cas. No. 4,824; Sprague v. 140 Bbls. Flour, 2 Story, 195, Fed. Cas. No. 13,253.

⁷ The Undaunted, Lush. 90.

(8) Saving people in boats of distressed ship.⁸

(9) Protecting ship, cargo, or persons aboard from pirates or wreckers.⁹

(10) Furnishing men or necessary supplies or appurtenances to a ship which is short of them.¹⁰

(11) Saving a ship, cargo, or persons aboard from fire either aboard or in dangerous proximity.¹¹

(12) Standing by a distressed ship.¹²

(13) Removing a ship from an ice floe or any impending danger.¹³

"To Marine Property."

It is difficult to understand why the motives of public policy on which the law of salvage is based do not apply to the rescue of any property in danger on navigable waters, whether such property ever formed part of a vessel or cargo or not. If, for instance, a passenger on a train crossing a bridge should drop a bag of gold or a valuable jewel case into a navigable stream, the salvor should be as much entitled to a reward as if it had been dropped from the deck of a steamer. But in view of the decision of the supreme court in the case of *COPE v. VALLETTE DRY-DOCK CO. OF NEW ORLEANS*,¹⁴ and the decision of the house of lords

⁸ *The Cairo*, L. R. 4 Adm. & Ecc. 184.

⁹ *Porter v. The Friendship*, Fed. Cas. No. 10,783.

¹⁰ *Butterworth v. The Washington*, Fed. Cas. No. 2,253; *Lamar v. The Penelope*, Fed. Cas. No. 8,007.

¹¹ *THE BLACKWALL*, 10 Wall. 1, 19 L. Ed. 870; *The Northwester*, Fed. Cas. No. 10,333; *The Lydia* (D. C.) 49 Fed. 666; *The T. P. Leathers*, Fed. Cas. No. 9,736; *The Boyne* (D. C.) 98 Fed. 444; *The Circasian*, 2 Ben. 171, Fed. Cas. No. 2,723.

¹² *The Maude*, 3 Asp. 338; *Allen v. The Canada*, 1 Bee. 90, Fed. Cas. No. 219.

¹³ *The Island City*, 1 Cliff. 210, Fed. Cas. No. 55; *Staten Island & N. Y. Ferry Co. v. The Thos. Hunt*, Fed. Cas. No. 13,326; *In re 50,000 Feet of Lumber*, 2 Low. 64, Fed. Cas. No. 4,783.

¹⁴ 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501.

in the *Gas Float Whitton Case*,¹⁵ it is a matter of great doubt whether salvage can be claimed against anything not connected in some way with a vessel of some character.¹⁶

"At Risk or in Distress."

This does not imply actual, imminent danger. It is a salvage service if the vessel is in such a condition as to be in need of assistance, though no immediate danger threatens. The test is well defined by Dr. Lushington: "All services rendered at sea to a vessel in distress are salvage services. It is not necessary, I conceive, that the distress should be immediate and absolute; it will be sufficient if, at the time the service is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered."¹⁷

Accordingly, in *The Albion*,¹⁸ a tug was allowed a salvage reward for bringing in a ship which had inadequate ground tackle, though no immediate storm threatened. And in the case of *The Ellora*,¹⁹ under similar weather conditions, salvage was allowed for bringing in a steamer which had lost her screw, though she was fully rigged with sails.²⁰

"By Those under no Legal Obligation to Render It."

This is usually briefly expressed in the books by speaking of salvage as a service "voluntarily rendered," and is meant to exclude services rendered by those under some contractual or binding obligation. Hence, as a rule, the crew of the distressed vessel cannot claim salvage, for that is a part of their duty. Nor can her pilot, for the same reason. Nor can the tug towing her, for that is a part of the contract of towage. Nor can a passenger, for he is working as much

¹⁵ [1897] App. Cas. 337.

¹⁶ See the discussion of this subject ante, p. 12.

¹⁷ *The Charlotte*, 3 W. Rob. 68.

¹⁸ Lush. 282.

¹⁹ Lush. 550.

²⁰ *The Fannie Brown* (D. C.) 30 Fed. 215.

to save himself as to save the vessel. Nor can the life-saving crews, for they are paid to do that very work.

There are circumstances under which these different classes may claim salvage, but an examination will show that, so far from weakening the general rule above stated, these circumstances emphasize and confirm it.

Same—The Crew.

The reason why they cannot ask salvage is that they are but fulfilling their contract of hiring when they work to save their ship. Hence, after the dissolution of such contract, they are free to claim it. Accordingly, in the case of *The Warrior*,²¹ where a ship had gone aground and her master took his crew ashore and discharged them, some of the crew who came back subsequently, and saved much of her stores and cargo, were allowed to claim salvage.

In the case of *The Florence*,²² the master abandoned his vessel at sea and took the crew ashore. Some of them returned to the wreck in another vessel, and assisted in saving the *Florence*. They were held entitled to salvage.

In *The Le Jonet*,²³ all the crew but the mate left the vessel, which had been injured in collision. He remained aboard, hoisted signals of distress, and secured thereby the aid of a steamer, which took her into port. He was awarded salvage.

Same—The Pilot.

A pilot cannot claim salvage for ordinary pilotage services, as they are covered by his pilot's fee. If, however, he does work outside the duties of a pilot, like working at the pumps or laying anchors and cables, he may claim as salvor. Perhaps the best expression of the principle is Dr. Lush-

²¹ Lush. 476.

²² 16 Jur. 572.

²³ L. R. 3 Adm. & Ecc. 556. See, on the general subject, *The C. F. Bielma* (D. C.) 108 Fed. 878.

ington's remarks in *The Saratoga*:²⁴ "In order to entitle a pilot to salvage reward, he must not only show that the ship is in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward."

An important case on the subject is *Akerblom v. Price*.²⁵

The awards to state pilots, however, are moderate from motives of public policy, and the temptation which high awards might offer.²⁶

Same—The Tug.

Under the head of towage, the circumstances under which a towage contract may be turned into a salvage service not contemplated by the original contract have already been discussed. Ante, p. 117, c. 5, § 57.

Same—Passengers.

Services rendered by a passenger in common with others can give no claim to salvage, as he is working for that self-preservation which is the first law of nature. But when he has an opportunity of saving himself, and stays by the ship instead of embracing such opportunity, his situation is analogous to the crew after the dissolution of their relation to the ship, and he may earn salvage.²⁷

So, too, a passenger who renders special services different from the rest of those aboard, as one who rigged up an ingenious steering apparatus for a disabled vessel, was awarded salvage in the case of *Towle v. The Great East-*

²⁴ Lush. 318.

²⁵ 7 Q. B. Div. 129.

²⁶ *The Relief* (D. C.) 51 Fed. 252.

²⁷ *Newman v. Walters*, 3 Bos. & P. 612.

ern,²⁸ though this is nearer the border line, and is hard to reconcile with the decision of Lord Stowell in the leading case of *THE BRANSTON*.²⁹

Same—Government Employes.

These cannot claim salvage for acts done as part of their public duties, as when the life-savers remove a crew or their property from a wreck, or a vessel of the navy suppresses a mutiny on a merchant vessel. But the better opinion is that they may claim for services outside their regular duties. For instance, in the *Cargo of The Ulysses*,³⁰ men from a vessel of the royal navy were refused salvage for protecting a wreck from plunderers, but allowed it for work in removing cargo.

“Which Results in Benefit to the Property if Eventually Saved.”

It is usually said that success is essential to constitute a salvage service; for unless the property is saved it is not a service, as a benefit actually conferred is the very foundation. A salvor may find a ship a thousand miles at sea, but if he loses her at the very harbor bar he forfeits his claim; for he has conferred no benefit upon her or her owners.

Hence it is that salvage awards are made sufficiently liberal to pay not only for the special service, but to encourage salvors to undertake other enterprises not so promising. And therefore salvors who do not complete their job can claim nothing if the vessel is subsequently rescued by other salvors, unless their efforts result in placing the vessel in a better position, and thereby facilitating the work of subsequent salvors.

For instance, in *THE KILLEENA*,³¹ a vessel put five

²⁸ Fed. Cas. No. 14,110.

²⁹ 2 Hagg. Adm. 3, note. *Candee v. 68 Bales of Cotton* (D. C.) 48 Fed. 479.

³⁰ 13 Prob. Div. 205.

³¹ 6 Prob. Div. 193.

of her crew aboard the Killeena, which was a derelict, to bring her into port. After a few days, they had enough of it, and were taken aboard another vessel at their own request. The second vessel then put some of her crew aboard, and took her in tow until the rope broke. The second crew secured the assistance of a steamer, stuck by the derelict, and brought her in. The first set were refused salvage, but the others were allowed it.

In *The Camellia*,³² a steamer towed the *Camellia* for half a day, and then had to leave her. But she had towed her 85 miles nearer to port, and about 12 miles nearer her course, thus giving her a better position. The *Camellia* reached port, and the *Victoria* was allowed a small sum as salvage.

THE AWARD—AMOUNT IN GENERAL.

64. The amount of a salvage award varies according to the character and skill of the salvors, the locality, the inducements necessary to encourage the service, the value of the property saved or of the salvor's property at risk, the danger to salvors and saved, the skill and labor involved, and the degree of success achieved.

Having thus discussed the general nature of salvage, the question of degree must now be considered, and the considerations enumerated which go to swell or reduce the award.

From a simple service that is salvage only in name, to those acts of heroism whose bare recital quickens the pulse, the range is immense. Hence it follows that no rule can be laid down by which a salvage service can be measured accurately. Each case has its peculiar circumstances, and the amount of a salvage award is largely a matter of judicial discretion, varying with the idiosyncrasies of the judge, and

³² 9 Prob. Div. 27.

regulated only by certain general rules. These are largely corollaries from the fundamental doctrine that salvage is the outgrowth of an enlightened public policy, and is awarded, not merely on a niggardly calculation *pro opere et labore* in the special case, but as an encouragement to induce the salvor and future salvors to incur risk in saving life and property.

SAME—ELEMENTS OF COMPENSATION AND BOUNTY

65. A salvage award consists of two elements:

- (a) Compensation for actual outlay and expenses made in the enterprise.
- (b) The reward as bounty, allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property.

The first of these items is practically a constant quantity; as a salvor, if his service is important, is always entitled, at least, to be repaid his expenses and to be paid for his labor.

The second element of salvage, or the bounty element, is the variable quantity in salvage awards. Being given on motives of public policy, it is more or less according to the merits of the service and the ability of the owners to contribute out of the funds saved.¹

The element of expense is always considered by the court, and usually allowed specifically, but not necessarily so. On this subject the house of lords, in the case of *THE DE BAY*,² says: "It was contended that some of these items ought not to be taken into consideration at all, as, for instance, the loss on charter; and it was further contended

§ 65. ¹ *The Egypt* (D. C.) 17 Fed. 359.

² 8 App. Cas. 559.

that in no case ought the items of loss or damage to the salving vessel be allowed as 'moneys numbered,' but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration. Their lordships are of opinion that this objection is not well founded. It was argued that by allowing the several items of the account, and then a further sum for salvage, the salvors would receive payment for their losses twice over; but this is only on the supposition that the court below, after giving the amount of the alleged losses specifically, has considered them again generally in awarding £5,000 for simple salvage services. It is not to be presumed that the learned judge has fallen into such an error, and, indeed, it appears that he has not done so, but that he considered the £5,000 a reasonable amount for salvage reward, wholly irrespective of damage and expenses. Their lordships are of opinion that it is always justifiable, and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage service. It is frequently difficult and expensive, and sometimes impossible, to ascertain with exactness the amount of such loss, and in such case the amount of salvage must be assessed in a general manner, upon so liberal a scale as to cover the losses, and to afford also an adequate reward for the services rendered. In the assessment of salvage regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage services to secure him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and, in addition to this, the salvor should receive a compensation for his exertion and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual; for, if

no more than a *restitutio in integrum* were awarded, there would be no inducement to shipowners to allow their vessels to engage in salvage services. If there be a sufficient fund, and the losses sustained by the salvor are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their lordships are unable to appreciate the argument that that which is known may be taken into account generally, but not specifically."

Professional Salvors.

It follows from these considerations that the greatest encouragement should be extended to those most competent to render the service. Hence the courts look with special favor on the efforts of steamers, and will not diminish their award on account of the rapidity of their service, but rather incline to enhance it, as promptness is specially commendable.³

Special favor is shown to steamers equipped for salvage work and to professional salvors, in view of the large expense of being always ready, even when no wrecks are reported, the rapid deterioration of such property, the difficulty in protecting it by insurance, and the importance of having the business in the hands of reputable men.⁴

Locality as Affecting the Award.

The awards may vary with the locality. The courts of the South Atlantic Coast have felt called upon to be liberal to salvors, on account of the special dangers of that coast, including Hatteras, the turning point of the winds, and a long and desolate seaboard devoid of harbors and populous cities. From these causes and the comparative fewness of craft, the dangers of distressed vessels are greatly multiplied, and hence the same service is better paid than if ren-

³ The London Merchant, 3 Hagg. Adm. 394.

⁴ THE GLENGYLE [1898] Prob. Div. 97; Id. [1898] App. Cas. 519; The Susan, 1 Spr. 499, Fed. Cas. No. 13,630.

dered on the northern coast, where harbors are abundant and passers-by are frequent.⁵

Increase or Diminution of Previous Rate of Allowance.

Salvage awards, being made on grounds of public policy, may vary at different times. If the courts find that the inducements held out are not sufficiently liberal to secure the service, if they find that distress signals are unheeded and valuable property abandoned, they will increase their awards, and, vice versa, if smaller awards will secure such efforts, they will diminish them.⁶

SAME—INCIDENTS OF THE SERVICE.

66. In addition to the above general considerations, the following elements in each special case enhance or diminish the amount of the award, according to their relative degree.

- (a) The degree of danger from which the lives or property are rescued.
- (b) The value of the property saved.
- (c) The value of the salvor's property employed and the danger to which it is exposed.
- (d) The risk incurred by the salvors.
- (e) The skill shown in the service.
- (f) The time and labor occupied.
- (g) The degree of success achieved, and the proportions of value lost and saved.¹

The Danger.

The largest awards have usually been given where life was at stake. Courts have differed as to whether the risk

⁵ The *Mary E. Dana*, 5 Hughes, 362, 17 Fed. 358; The *Fannie Brown* (D. C.) 30 Fed. 222, 223; *Cohen*, Adm. 131.

⁶ The *Daniel Steinman* (D. C.) 19 Fed. 921, 922; The *Edam* (D. C.) 13 Fed. 140, 141.

§ 66. ¹ The *Sandringham*, 5 Hughes, 316, 10 Fed. 556.

which the salvor himself incurs, or that from which the others are delivered, ought first to be considered, but they do not differ as to the paramount merit of a service into which either of these ingredients enters.² So, too, as to risk incurred by the property itself, primarily of the salvaged, secondarily of the salvor. The greater the risk, the greater the merit of the service and the greater the award.

Under this head, the awards in derelict cases may be considered. Derelicts are necessarily in greatest danger. They become derelicts because their crews abandon them as sinking vessels, and, even if they do not at once go down, the chance of finding them is small. Hence it was long the practice of the admiralty courts to award half in such cases. But the later decisions, looking at the reason rather than the rule, consider all the circumstances, and give less than half, if a lesser amount will handsomely reward the salvor.³

As expressed by Dr. Lushington in *THE TRUE BLUE**: "The fact of derelict is, as it were, an ingredient in the degree of danger in which the property is."

The Values and Risk Incurred.

The value of the property saved is an important element. For a long time the courts were in the habit of giving fixed proportions. In fact, originally the salvors were probably paid in kind. In modern times the rule of proportion has been discarded.

On small values saved the proportion is necessarily greater than on large. Hence, when values are very great, the awards do not materially increase. The court will give a sufficient sum to compensate the salvors handsomely for their labor and risk, and encourage them to go and do like-

² *The William Beckford*, 3 C. Rob. 356; *The Traveller*, 3 Hagg. Adm. 371; *THE AKABA*, 4 C. C. A. 281, 54 Fed. 197.

³ *The Sandringham*, 5 Hughes, 316, 10 Fed. 556; *THE TRUE BLUE*, L. R. 1 P. C. 250; *The Amerique*, L. R. 6 P. C. 468; *The Janet Court* [1897] Prob. Div. 59.

* L. R. 1 P. C. 250.

wise, but then its object is accomplished. In an ordinary case of towage salvage, for instance, its award for saving \$500,000 would not greatly differ from its award for saving \$300,000.⁴

The Skill.

The skill shown by the salvors is an important element, to which the court pays great attention. It is on this account that professional salvors are especially encouraged and most liberally rewarded, for they usually possess special skill and experience. Volunteer salvors are only expected to show the skill incident to their calling, and are only paid for such. Unskillfulness causing damage will diminish a salvage award, though the court makes all allowances for salvors.⁵

A salvor may be legally chargeable with negligence as to third parties, and yet not be negligent as to the property saved. For instance, where two tugs in New York Harbor were towing a vessel away from a burning dock, and owing to their insufficient power brought her into collision with other vessels, they were held liable to these vessels, but entitled to have the damages for which they were liable considered in fixing the salvage award.⁶

Misconduct or bad faith will cause a diminution or even an entire forfeiture of salvage; for, as public policy is the foundation of the doctrine, good faith and fair dealing are essential.⁷

The Time and Labor.

As to the time and labor occupied, if the service involves a long time and great labor, it will, of course, be taken into account. In the case of steamers, however, the shortness of

⁴ THE CITY OF CHESTER, 9 Prob. Div. 202-204.

⁵ The Magdalen, 31 Law J. Adm. 22; The Cheerful, 11 Prob. Div. 3; The Dygden, 1 Notes of Cases, 115; The C. S. Butler, L. R. 4 Adm. & Ecc. 178; The S. W. Downs, 1 Newb. 458, Fed. Cas. No. 13,411.

⁶ The Ashbourne (D. C.) 99 Fed. 111.

⁷ THE CLANDEROYE, 17 C. C. A. 300, 70 Fed. 631; The North Carolina, 15 Pet. 40, 10 L. Ed. 653; The Boston, 1 Sumn. 341, Fed. Cas.

time does not detract from the service. Dr. Lushington put this very well when he said that he could not understand why the patient should complain of the shortness of an operation.⁸

The Result Achieved.

As to the degree of success achieved, and the proportion of values lost and saved, the principle is that, if the entire property is saved, the owner, having suffered less, can better afford to pay handsomely than if only a portion is saved, and the salvor is to be paid out of a mere remnant.

For instance, other things being equal, the court will decree a larger award if an entire cargo of \$100,000 is saved than it would if out of an entire cargo of \$300,000 only \$100,000 were saved.⁹

SALVAGE CONTRACTS.

67. A salvage contract is binding if free from all circumstances of imposition and the negotiations are on equal terms; but not if the salvor takes advantage of his position, or if either is guilty of fraud or misrepresentation.

In modern times salvage generally springs from contract. The courts at one time went very far in doing away with the binding effect of such contracts, often saying that the amount agreed on is only presumptive evidence, and may be inquired into.

It is difficult to see why there should be any difference be-

No. 1,673; *The Byron*, Fed. Cas. No. 2,275; *The Bello Corrunes*, 6 Wheat. 152, 5 L. Ed. 229; *The Gov. Ames* (C. C. A.) 108 Fed. 969.

⁸ *The General Palmer*, 5 Notes of Cas. 159; *The Thomas Fielden*, 82 Law J. Adm. 61; *The Andalusia*, 12 L. T. (N. S.) 584.

⁹ *The Sandringham*, 5 Hughes, 316, 10 Fed. 556; *The Isaac Allerton*, Fed. Cas. No. 7,088.

tween a salvage contract and any other. Circumstances of fraud, oppression, or inequality will affect any contract. Hence it is easy enough to understand why a contract made at sea between a helpless wreck and an approaching rescuer should be inquired into, just like a contract made on land under the persuasive muzzle of a revolver. But when the circumstances show no inequality of negotiation, as when the owner of a sunken vessel, after ample deliberation, contracts on land, in the comfort of his office, to have his vessel raised, there is no reason, on principle, why he should not be held to his bargain, even if it should turn out to be a bad one. And so the supreme court has recently decided.¹

SALVAGE APPORTIONMENT.

68. A salvage award is apportioned among those who contribute directly or indirectly to the service, including the owners of the salving property at risk ; and admiralty has jurisdiction of a suit to compel an apportionment.

Having discussed the doctrines governing the assessment of a salvage award, it is now necessary to consider to whom the amount so fixed should be paid. As a rule, it goes only to those who participated, directly or indirectly, in the service. All the salving crew share, those immediately engaged most largely ; but those whose work on the salving vessel is increased also share in less proportion. The owners of the salving vessel, though not present, participate on account of the risk to which their property is exposed. If the salving vessel is a steamer, her owners receive much the greater portion, on account of the efficiency of such vessels. In such

§ 67. ¹ *The Sir William Armstrong* (D. C.) 53 Fed. 145; *THE ELFRIDA*, 23 C. C. A. 527, 77 Fed. 754, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413; *Akerblom v. Price*, 7 Q. B. Div. 129.

cases it is usually the rule to award the owners three-fourths.¹

Of the amount set aside for the crew, the master, on account of his responsibilities, receives much the larger proportionate share, and the remainder is divided among the crew in proportion to their wages, unless special circumstances call for special allowances. Passengers or other persons aboard the salving ship may share if they render aid.

It is frequently necessary to make a salvage award as a whole, and then apportion it among different sets of salvors. The apportionment is made according to their relative merits, though the first set of salvors usually receive special consideration.²

Admiralty has jurisdiction of a suit by co-salvors to compel a refunding by a salvor to whom the entire award has been paid.³

SALVAGE CHARGEABLE AS BETWEEN SHIP AND CARGO.

69. A salvage award is charged against vessel and cargo in proportion to their values at the port of rescue, each being severally liable for its share alone. Freight contributes pro rata itineris.

Having thus discussed to whom a salvage award is to be paid, let us now consider who are to pay it. The principle is that vessel, cargo, and freight money saved are to contribute according to their relative values at the port of rescue. The same percentage is charged against all, even though portions were saved more easily and were at less

§ 68. ¹ *The City of Paris*, Kenn. Civ. Salv. 154; *Cape Fear Towing & Transp. Co. v. Pearsall*, 33 C. C. A. 161, 90 Fed. 435.

² *The Santipore*, 1 Spinks, 231; *The Livietta*, 8 Prob. Div. 24.

³ *McConnochie v. Kerr* (D. C.) 9 Fed. 50.

risk; the reason being that differences in this respect would produce endless confusion, and tempt the salvors to save portions of the cargo without attempting to rescue other portions. Even specie is subject to the same rule.¹

If the voyage has not been completed, the court will prorate the freight money from the initial point to the port of rescue, and make only that proportion of the freight contribute. For instance, if the voyage is one-third completed at the time of the accident, the value of one-third of the freight will be taken, on which salvage will be assessed.²

As between ship and cargo, each is liable severally only for its own proportion. The salvor who neglects to proceed against both cannot recover his entire salvage from one.³

The case of *The Lamington* ⁴ contains an interesting compilation of salvage precedents.

§ 69. ¹ *The St. Paul*, 30 C. C. A. 70, 86 Fed. 340; *The Longford*, 6 Prob. Div. 60.

² *THE NORMA*, Lush. 124; *The Sandringham*, 5 Hughes, 316, 10 Fed. 556.

³ *The Raisby*, 10 Prob. Div. 114; *The Jewell* (D. C.) 41 Fed. 103; *The Alaska* (D. C.) 23 Fed. 597.

⁴ 30 C. C. A. 271, 86 Fed. 675.

CHAPTER VII.

OF CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES.

- 70-72. "Contracts of Affreightment" Defined, and Distinguished from Charter Parties.
- 73. Warranties Implied in Contracts of Affreightment against Unseaworthiness and Deviation.
- 74. Mutual Remedies of Ship and Cargo on Contracts of Affreightment.
- 75. Entirety of Affreightment Contract.
- 76. Apportionment of Freight.
- 77-78. Ship as Common Carrier.
- 79. Bill of Lading—Making and Form in General.
- 80. Negotiability.
- 81. Exceptions in General.
- 82. Exception of Perils of the Sea.
- 83. "Charter Parties" Defined.
- 84. Construction of Charter Parties.
- 85. Conditions Implied in Charter Parties of Seaworthiness and against Deviation.
- 86. Cancellation Clause in Charter Parties.
- 87. Loading Under Charter Parties.
- 88. Execution of Necessary Documents under Charter Parties.
- 89. Cesser Clause in Charter Parties.

"CONTRACTS OF AFFREIGHTMENT" DEFINED, AND DISTINGUISHED FROM CHARTER PARTIES.

- 70. A vessel may be operated by her owners on their own account, or she may be hired by her owners to others.
- 71. The hiring of a vessel to others is usually done by charter parties.
- 72. When a vessel is operated by her owners on their own account, or contracts direct with

her shippers, such contracts are called "contracts of affreightment."

The contracts of vessels heretofore discussed have been those incidental transactions tending to facilitate the object of her creation. The class of contracts which we are now to discuss spring directly out of her use as a business enterprise.

A vessel is made to plow the seas, not to rot at the piers. But, with the exception of those which are used as toys by the rich, they do not plow the seas for mere amusement. The reward which she earns for transporting cargo is called "freight." In the case of *BRITTAN v. BARNABY*,¹ Mr. Justice Wayne defines "freight" as the hire agreed upon between the owner or master for the carriage of goods from one port or place to another.

WARRANTIES IMPLIED IN CONTRACTS OF AFFREIGHTMENT AGAINST UNSEAWORTHINESS AND DEVIATION.

73. In contracts of affreightment there is an implied warranty of seaworthiness and against deviation.

The warranty of seaworthiness in the relations between vessel and shipper is one of the most rigid known to the law. It is a warranty that at the commencement of the voyage the vessel shall be thoroughly fitted for the same, both as regards structure and equipment. It is not merely a warranty that the vessel owner will exercise reasonable care to have her in this condition, or even that he will repair such things as are discoverable, but it is an absolute warranty of fitness for the voyage against even such defects as are latent.¹

§§ 70-72. ¹ 21 How. 527, 16 L. Ed. 177.

§ 73. ¹ *The Northern Belle*, 154 U. S. 571, 14 Sup. Ct. 1166, 19 L. HUGHES, AD.—10

The warranty against deviation is that the vessel will pursue her voyage by the accustomed route without unnecessary delay; though going to a port a little out of the straight course, when it is shown to be the usage of that navigation for vessels to stop by such a port, would not be considered as a deviation.²

MUTUAL REMEDIES OF SHIP AND CARGO ON CONTRACTS OF AFFREIGHTMENT.

74. It is a fundamental principle that the ship is pledged to the cargo and the cargo to the ship for the fulfillment of the conditions of the contract of carriage.

This reciprocal right of procedure is one of the most ancient doctrines of the admiralty courts. Under it, the vessel has a lien upon the cargo for its freight money.¹

This lien or right of the vessel to hold the cargo for its freight money differs from the admiralty liens heretofore discussed in the fact that it is dependent upon actual or constructive possession. The vessel owner who delivers the cargo unconditionally into the possession of the consignee loses his right to hold the cargo itself for his freight.²

But one of the principles of the law of freight is that freight is not due until the cargo is unloaded, and the consignee has an opportunity to inspect the goods and ascertain their condition. Hence the master of a vessel cannot demand his freight as a condition precedent to unloading;

Ed. 748; *THE CALEDONIA*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

² *HOSTETTER v. PARK*, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568; *The Prussia* (D. C.) 100 Fed. 484.

§ 74. ¹ *Certain Logs of Mahogany*, 2 Sumn. 589, Fed. Cas. No. 2,559.

² *Pioneer Fuel Co. v. McBrier*, 28 C. C. A. 466, 84 Fed. 495; *Cargo of Fertilizer* (D. C.) 88 Fed. 984.

nor, on the other hand, can the consignee demand the goods as a condition precedent to paying the freight. The master, in other words, must discharge his goods, but not deliver them. If he and the consignee are dealing at arm's length, his proper procedure would be to discharge them in a pile by themselves, notifying the consignee that he does not give up his lien for freight; or, if necessary for their protection, discharge them into a warehouse, or into the hands of a third person. Then if the consignee, after a reasonable time allowed for inspection, does not pay the freight, the master can proceed in rem against the goods to enforce its payment.³

Conversely, the cargo has a right of procedure against the ship for any violation of the contract of affreightment.⁴

ENTIRETY OF AFFREIGHTMENT CONTRACT.

75. The contract of affreightment is an entire contract, so that freight is not earned until the contract is completed.

On this subject Mr. Justice Story says in the case of *The Nathaniel Hooper*, above cited: "The general principle of the maritime law certainly is that the contract for the conveyance of merchandise on a voyage is in its nature an entire contract, and, unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due: for a partial conveyance is not within the terms or the intent of the contract, and, unless it be completely performed by the delivery of the goods at the

³ *BRITTAN v. BARNABY*, 21 How. 527, 16 L. Ed. 177; *BAGS OF LINSEED*, 1 Black, 108, 17 L. Ed. 35; *The Nathaniel Hooper*, Fed. Cas. No. 10,932; *The Cassius*, 2 Story, 81, Fed. Cas. No. 564; *The Treasurer*, 1 Spr. 473, Fed. Cas. No. 14,159.

⁴ *The Rebecca*, 1 Ware, 187, Fed. Cas. No. 11,619; *Bulkley v. Cotton Co.*, 21 How. 386, 16 L. Ed. 599.

place of destination, no freight whatsoever is due, and the merchant may well say 'Non in hæc fœdera veni.'"

Under this principle, in case of a marine disaster, the master has the right to repair and complete the voyage even though this action on his part involves delay, or he may transship the goods into another vessel and so save the freight. If the delay or the condition of the goods is such as to render either of these expedients unprofitable, he may sell the goods at an intermediate port, and terminate the venture, but in the latter case he would not be entitled to his freight.¹

APPORTIONMENT OF FREIGHT.

76. Freight is payable pro rata at an intermediate port, if the voyage is broken up, only by the consent of the consignee, either actual, or implied from his voluntarily receiving his goods at such intermediate port.

This is not an exception to the general rule based upon the principle of entirety of contracts, that freight is only due when the voyage is completed. It is merely tantamount to saying that the parties, by mutual agreement, may rescind the contract at an intermediate port. Hence the acceptance of the goods at an intermediate port, not voluntarily, but in pursuance of a practical necessity on the part of the consignee to receive them, does not entitle the vessel to pro rata freight, and if the vessel incurs expenses before leaving the initial port at all, or "breaking ground," as it is technically called, no pro rata freight could be equitably claimed.¹

§ 75. ¹ Jordan v. Banking Co., Fed. Cas. No. 7,524; Hugg v. Insurance Co., 7 How. 595, 12 L. Ed. 834.

§ 76. ¹ The Nathaniel Hooper, Fed. Cas. No. 10,032; Sampayo v.

The delivery of the cargo on a wharf with notice to the consignee, or even without notice, if that is the usage of the port, is a termination of the ship's liability as carrier.²

The vessel owner is entitled to his freight if the goods arrive in specie, even though they have been so injured as to be practically valueless, provided the injury is not caused by such acts as would render the carrier liable.³ In a suit by the vessel owner for freight, the consignee may in the same suit plead in recoupment any damage done to the goods for which the carrier is liable.⁴ The receipt of the goods by the consignee is an implied promise on his part to pay the freight, and he may be sued for it personally.⁵

SHIP AS COMMON CARRIER.

77. A ship may or may not be a common carrier, according to the manner in which she is being used.

78. A general ship is a common carrier.

We must now consider in what capacity a ship carries on her trade, whether in the hands of her owners or her charterers. When is a ship a common carrier, and when not? It is not easy to define exactly who are common carriers and who are not. The test is well laid down in the case of *The Niagara*,¹ where the court says: "A com-

Salter, 1 Mason, 43, Fed. Cas. No. 12,277; *The Tornado*, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747.

² *Constable v. Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903.

³ *Hugg v. Insurance Co.*, 7 How. 595, 12 L. Ed. 834; *Seamen v. Adler* (C. C.) 37 Fed. 268.

⁴ *Snow v. Carruth*, 1 Spr. 324, Fed. Cas. No. 13,144; *Bearse v. Ropes*, 1 Spr. 331, Fed. Cas. No. 1,192.

⁵ *Philadelphia & R. R. Co. v. Barnard*, 3 Ben. 39, Fed. Cas. No. 11,086; *Trask v. Duvall*, 4 Wash. C. C. 181, Fed. Cas. No. 14,144.

§§ 77, 78. ¹ 21 How. 22, 16 L. Ed. 41.

mon carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is in general bound to take the goods of all who offer." Story thus defines a "common carrier": "To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*." ²

From this definition it is clear that regular liners are common carriers, as is any ship that carries on business for all, and by advertisement or habit carries goods for all alike. A general ship is a common carrier.³

On the other hand, a ship chartered for a special cargo, or to a special person, is not a common carrier, but only an ordinary bailee for hire.⁴

BILL OF LADING—MAKING AND FORM IN GENERAL.

79. The document evidencing the contract of shipment is known as a "bill of lading." Even in the case of chartered vessels, and of course in the case of vessels trading on owner's account, the bill of lading is usually given by the master to the shipper direct, and binds the vessel or her owners to the shipper.

² Story, Bailm. § 495.

³ *Liverpool & G. W. S. Co. v. Insurance Co. (The Montana)* 129 U. S. 437, 9 Sup. Ct. 469, 32 L. Ed. 788.

⁴ *Lamb v. Parkman*, 1 Spr. 343, Fed. Cas. No. 8,020; *The Dan* (D. C.) 40 Fed. 691; *Nugent v. Smith*, 1 C. P. Div. 423.

Originally it was a simple paper. Here is an old form:

"Shipped by the grace of God, in good order, by A. B., merchant, in and upon the good ship called the John and Jane, whereof C. D. is master, now riding at anchor in the river Thames, and bound for Barcelona, in Spain, 20 bales of broadcloth, marked and numbered as per margin; and are to be delivered in the like good order and condition at Barcelona aforesaid (the dangers of the sea excepted), unto E. F., merchant there, or to his assigns, he or they paying for such goods, ——— per piece freight, with primage and average accustomed. In witness whereof the master of said ship hath affirmed to three bills of lading of this tenor and date, one of which bills being accomplished, the other two to stand void. And so God send the good ship to her destined port in safety.

"Dated at London the ——— day of ———."

This form is substantially the same as that used to-day by the coastwise schooners.

But under modern business methods a shipper of produce for export, like cotton, tobacco, or grain, can go to his railway station far inland, and procure a through bill of lading to England or the Continent. This is a very elaborate document, amphibious in nature, as half its stipulations apply to land carriage and half to water carriage. A sample may be seen in a footnote to the case of *The Montana*.¹

SAME—NEGOTIABILITY.

80. A bill of lading is negotiable only in a qualified sense. It does transfer the title, but it is not so far negotiable as to shut out any defenses which could be made as between the carrier and the original holder.

§ 79. ¹ 129 U. S. 401, 9 Sup. Ct. 469, 32 L. Ed. 788.

For instance, in the case of *The Treasurer*,¹ the assignee of a bill of lading illegally refused to pay the freight, and the consignee thereupon treated this as rescinding the contract of sale between him and the assignee for the cargo represented by the bill of lading and sold it to a third party. The assignee thereupon proceeded against the ship. Judge Sprague held, however, that as he had illegally refused to pay the freight, the master could have even sold the cargo, and that the indorsing of the bill of lading to him gave him no greater rights than any other delivery by symbol could have; that such a delivery could have no greater efficacy than a manual delivery of the property itself, and therefore his action could not be maintained; and it is well settled that the master may prove a short delivery of cargo in cases where he is not responsible even against an assignee of a bill of lading.

It is also well settled that a master cannot bind the vessel or owners by receipting for goods not actually in his custody, but that such defense can be set up even against a bona fide holder of the bill of lading, though it is sometimes a nice question as to the exact point at which the goods passed into the custody of the master.²

A recital in the bill of lading that goods are received in good condition puts upon the carrier the burden of proving a loss by excepted perils in case the goods when delivered are in a damaged condition.³

§ 80. 11 Spr. 473, Fed. Cas. No. 14,159.

² *American Sugar Refining Co. v. Maddock*, 36 C. C. A. 42, 93 Fed. 980; *Bulkley v. Cotton Co.*, 24 How. 386, 16 L. Ed. 599; *Richmond & D. R. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944.

³ *BRITTAN v. BARNABY*, 21 How. 527, 16 L. Ed. 177; *The Queen (D. C.)* 78 Fed. 155; *Nelson v. Woodruff*, 1 Black, 156, 17 L. Ed. 97.

SAME—EXCEPTIONS IN GENERAL.

81. Independent of statute, a carrier cannot stipulate for exemption from negligence in a bill of lading, as such a stipulation contravenes public policy.¹

But he may value the goods in the bill of lading, and limit his liability to that valuation.² And he may limit his liability for a passenger's baggage.³ He may require claims to be made against him in a limited time.⁴

Under the decisions of the English courts, a carrier may stipulate for exemption from negligence. As nearly all the foreign carrying trade is done in English bottoms, some smart Englishman inserted in their bills of lading a clause known as the "flag clause," which stipulated that the contract of carriage should be governed by the law of the vessel's flag. The object was to protect the English carrier against the American shipper. The American courts as a rule have refused to enforce this clause, looking upon it as an indirect attempt to stipulate against negligence.⁵

It is beyond the limits of this treatise to discuss the construction of the various exceptions contained in bills of lading.

§ 81. ¹ NEW YORK C. & H. R. CO. v. LOCKWOOD, 17 Wall. 357, 21 L. Ed. 627; Virginia & T. R. Co. v. Sayers, 26 Grat. (Va.) 328.

² Richmond & D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849; Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.

³ Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587.

⁴ Express Co. v. Caldwell, 21 Wall. 264, 22 L. Ed. 556; The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. —.

⁵ The Guildhall (D. C.) 58 Fed. 796; Id., 12 C. C. A. 445, 64 Fed. 867; The Glenmavis (D. C.) 69 Fed. 472; The Victory (D. C.) 63 Fed. 640.

SAME—EXCEPTION OF PERILS OF THE SEA.

82. The term “perils of the sea” in a bill of lading means accidents incident to navigation which are unavoidable by the use of ordinary care.

There is a mass of learning and refinement of distinction as to the proper construction of that universal clause, “perils of the sea.” It means such accidents incident to navigation as are unavoidable and are the sole proximate cause of the loss. Mr. Justice Woods rather too broadly defines the expression as “all unavoidable accidents from which common carriers by the general law are not excused, unless they arise from act of God.”¹

The accident from which a carrier is exempted under this clause must arise independently of the crew’s acts. If their negligence co-operates, the carrier is responsible. Hence there are a great many decided cases on the question whether the proximate cause of the loss was the act of the crew or a peril of the sea.

The recent case of *THE G. R. BOOTH*² is an instructive one on this point, as it reviews the American decisions. In it the supreme court held that a loss caused by an explosion of detonators which blew a hole in the ship, and let the water rush in, was not a peril of the sea; that the phrase alluded to some action of wind or wave, or to injury from some external object, and did not cover an explosion arising from the nature of the cargo; and that the proximate cause was the explosion, and not the inrush of the water.

To show how narrow is the line of demarkation, the court distinguishes this from the case of *Hamilton v. Pandorf*,³

§ 82. ¹ *Dibble v. Morgan*, 1 Woods, 406, Fed. Cas. No. 3,881.

² 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234.

³ 12 App. Cas. 518.

in which rats had gnawed a lead pipe, which permitted water to escape and cause damage. The house of lords held that this was a peril of the sea. The supreme court distinguished it on the ground that the water escaped gradually, and therefore was the proximate cause.

At first it was thought that a collision caused by the negligence of either of the two vessels was not a peril of the sea, as a human agency intervened. But the better opinion seems to be that, if the carrying ship is blameless, a collision is a peril of the sea as to her and her cargo, even though the other ship was to blame.⁴

Although stipulations for protecting the shipowner for loss of goods carried on deck are not rigidly construed, yet even there they do not protect from a loss caused by negligence.⁵

"CHARTER PARTIES" DEFINED.

83. When the owners of a vessel hire her out, the contract of hire is called a "charter party," and the hirer is called a "charterer."

There are many different kinds of charter party in use. The owner hires his ship out for a definite time, as for a month or a year. This is called a "time charter."¹ A voyage charter is one in which he hires her out for a definite trip, as, for instance, a single trip between two points, or a round trip from one port by one or more others back to the initial port.

Charters vary also according to the manner in which the hire is payable. A "lump sum" charter, for instance, is one in which the charterer pays a fixed price for the ship. The

⁴ *The Xantho*, 12 App. Cas. 503.

⁵ *Compania de Navegacion La Flecha v. Brauer*, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398.

§ 83. ¹ *The Mary A. Randall*, 39 C. C. A. 335, 98 Fed. 895.

owner gets his money whether the charterer puts any cargo aboard or not. If he can sublet room to shippers at good rates, the charterer makes a profit; otherwise, a loss. It is very much the same transaction as renting a house and trying to sublet the rooms.

A tonnage charter is where the charterer pays a certain rate per registered ton, or per ton of dead weight carrying capacity.

Charters vary also with the cargo to be carried. For instance, there are grain charters, cotton charters, petroleum charters, coal charters, charters for general cargo, and many others. Though similar in the main, each has its own peculiar provisions growing out of the needs and customs of the particular business.

Again, an owner may charter his bare ship, leaving the charterer to furnish a crew, or he may merely charter the use of the ship, furnishing the crew himself. This distinction is important if a question should arise whether the owner or the charterer is responsible for any tort of the crew. If the crew is employed by the owner, then they are his agents, and he is responsible for their acts within the scope of their employment. If they are employed by the charterer, then he is responsible.²

Charter parties are almost invariably made by shipbrokers, who keep on hand printed blanks of the various kinds, and execute them by telegraphic or cable authority.

They are usually in writing, but may be by parol.³

They have grown to be very elaborate in their provisions, being an evolution from experience, as suggested by difficulties actually arising. On the other hand, the additions elicited by experience have frequently been made by laymen, who do not always stop to notice how the condition

² *The Nicaragua* (D. C.) 71 Fed. 723; *Bramble v. Culmer*, 24 C. C. A. 182, 78 Fed. 497.

³ *James v. Brophy*, 18 C. C. A. 49, 71 Fed. 310.

harmonizes with what is already there. Hence, to the lawyers and judges, they appear informal and inartistic; and, in the case of *RAYMOND v. TYSON*,⁴ the supreme court so characterizes them, and says that they are to be liberally construed on that account, thus placing them in the category of legal instruments which are supposed to be drawn by that constant friend of the legal profession,—the man who is *inops consilii*.

CONSTRUCTION OF CHARTER PARTIES.

84. A charter party is governed by the ordinary principles of contract law. Provisions which, when violated, defeat the venture, absolve the injured party from the contract. Others, not so vital, give, if violated, a claim for damages.

A charter party is, after all, but an ordinary contract, and is governed by the same rules that apply in the construction of ordinary contracts.

Special Provisions in.

Perhaps a few illustrations taken from cases that have gone to the supreme court might be useful.

In the case of *LOWBER v. BANGS*,¹ the instrument contained a provision that the vessel (which, as is usually the case, was not at the loading port when the charter was effected), should proceed to the loading port "with all possible dispatch." She did not do so. The court held that, on account of the necessity of promptness in commercial enterprises, this provision was not a collateral clause, whose breach would give rise merely to an action for damages, but that it was a warranty, whose breach avoided the con-

⁴ 17 How. 53, 15 L. Ed. 47.

§ 84. ¹ 2 Wall. 728, 17 L. Ed. 768.

tract and released the charterers. It would also give a right of action for damages against the owners.² And a delay in arriving, which made it so late in the season as to prevent the charterer from obtaining insurance, the vessel's agent having represented that she would arrive in time, absolves the charterer.³

Quite similar to this was the case of *Davison v. Von Lingen*.⁴ Here the charter party contained a provision that the vessel had "now sailed or about to sail from Benizoa." In fact, she was only one-third loaded, and did not sail for some time. The court held that the charterer could refuse to load her on arrival, and could recover the extra cost of chartering another vessel to carry his cargo. The charter party is given in the opinion.

In the case of *Watts v. Camors*,⁵ the charterer agreed to load a vessel of 1,100 tons or thereabouts. Her actual burden was 1,203 tons. The court held that the charterer must load her.

The *John H. Pearson*⁶ was a fruit charter, in which a vessel from Gibraltar to Boston engaged to "take the Northern passage." The court held that this was a term of art, and, if none such was known, she should go through the coolest waters to her destination.

The case of *Culliford v. Gomila*⁷ contains a grain charter party in the report. In it the vessel guarantied to take 10,000 quarters of grain. The charterers, however, did not stipulate any definite day on which she was to enter upon the charter party, or any definite day when she was to commence loading. When loaded she contained only 9,633 quarters, and the parties to whom the charterers had sold

² *Sanders v. Munson*, 20 C. C. A. 581, 74 Fed. 649.

³ *Oades v. Pfohl* (D. C.) 104 Fed. 998.

⁴ 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885.

⁵ 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406.

⁶ 121 U. S. 469, 7 Sup. Ct. 1008, 30 L. Ed. 979.

⁷ 128 U. S. 135, 9 Sup. Ct. 50, 32 L. Ed. 381.

the full cargo of 10,000 quarters refused to take it, the market having fallen. Afterwards, the ship, by removing more coal and water ballast, took the full amount. The court held that she had fulfilled her contract, and was not liable to the charterers for their loss.

In *The Gazelle*,⁸ the charter party contained a clause that the vessel should be ordered to a "safe * * * port, or as near thereto as she can safely get, and always lay and discharge afloat." The charterers ordered her to a port having a bar at its mouth, which she could not cross, the only anchorage outside the bar being in the open sea. The master refused to go. The court upheld him, and ruled also that evidence of a custom to anchor and discharge outside the bar was inadmissible against the express provisions of the contract.⁹

CONDITIONS IMPLIED IN CHARTER PARTIES OF SEAWORTHINESS AND AGAINST DEVIATION.

85. In contracts of charter party there is an implied condition of seaworthiness and against deviation.

Although the language in the forms now in use frequently covers it, yet there are certain conditions implied in a charter party, in the absence of express provisions to the contrary. They are:

1. That the ship is seaworthy.

Charter parties usually contain a provision that the vessel is "tight, stanch, and strong, and in every way fitted for the voyage." This warranty of seaworthiness is a very rigid one, and means that the vessel is actually seaworthy, not merely that her owner has done his best to make her

⁸ 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496.

⁹ *The Benlarig* (D. C.) 99 Fed. 298.

so. It applies not only to the beginning of loading, but to the time of sailing as well, and the vessel will be liable for damages caused by unseaworthiness at starting, or by unseaworthiness on the voyage from causes not covered by exceptions, or from causes which he could repair. Perhaps an illustration or two will make this plainer.

In *THE CALEDONIA*,¹ a vessel with a cattle cargo broke her shaft at sea, thereby greatly lengthening the voyage, and causing much loss in their quality. The court held the vessel responsible, though the breakage arose from a latent defect.

In *STEEL v. STATE LINE S. S. CO.*,² a lower port-hole was left insufficiently fastened. Sea water came through and injured the cargo. The court held that if this was the condition at sailing it was a violation of the warranty of seaworthiness. This case is specially instructive.

In *Cohn v. Davidson*,³ the vessel was seaworthy when she commenced to load, but unseaworthy when she sailed. The court held that this was a breach of the warranty.

In *Worms v. Storey*,⁴ a vessel which was seaworthy at starting became unseaworthy during the voyage from causes excepted in the contract. But she put into port, where she could have repaired, and did not. She was held liable for a breach of the warranty.

This doctrine applies not only to structural defects, but to deficiencies of equipment, as, for instance, an insufficient supply of coal for the voyage, or insufficient ballast.⁵ But if the charterers examine the vessel before chartering her, and accept her, they cannot complain of such defects as they

§ 85. ¹ 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

² 3 App. Cas. 72.

³ 2 Q. B. Div. 455.

⁴ 11 Exch. 427.

⁵ *The Vortigern* [1899] Prob. Div. 140; *Weir v. Steamship Co.* [1900] App. Cas. 525.

could reasonably have discovered, though they still may complain of latent defects.⁶

2. That the vessel will commence and prosecute the voyage with reasonable diligence and without unnecessary deviation.

Charter parties usually cover this by a stipulation that the vessel, if not at the loading port, shall "at once sail and proceed" thereto, and shall when loaded "proceed with all practicable dispatch." If she fails to do so in the first instance, the charterer may, as decided in the cases of *Lowber v. Bangs* and *Davison v. Von Lingen*, above cited, refuse to load her, and have his action for damages. If by excepted perils she is so delayed that the commercial enterprise is frustrated, the charterer may refuse to load her, but in such case he would have no action for damages.⁷ If by deviation the charterer suffers loss, he can sue for damages.⁸ The provisions of a charter party regulate the respective rights and duties of the parties before loading, during loading, during the voyage, and in discharging.

CANCELLATION CLAUSE IN CHARTER PARTIES.

86. If the vessel does not arrive by the date specified, the charterer may refuse to load, even though the delay was due to excepted perils. If she does not arrive within a reasonable time, she is liable for damages, even though she arrives before the canceling date.

The ship's first duty is to proceed to the loading port with reasonable diligence. To enforce this obligation, a clause called the "cancellation clause" is inserted. It provides that, if the vessel does not arrive at the loading port

⁶ *Waterhouse v. Mining Co.*, 38 C. C. A. 281, 97 Fed. 466.

⁷ *Jackson v. Insurance Co.*, L. R. 10 C. P. 125.

⁸ *Saramanga v. Stamp*, 5 C. P. Div. 295.

ready to load by a given date, all her holds being clear, the charterers may cancel. Under this the charterers may cancel, even though the delay was caused by excepted perils.¹

If the canceling clause is worded as above, she must not only arrive by the canceling date, but she must also be ready for cargo by that date. For instance, her ballast and dunnage must be out, and all the spaces to which the charterer is entitled must be cleared from the effects of former cargoes and ready for use. She must be in such condition as to satisfy the underwriter's inspector and all reasonable requirements for avoiding injury to cargo.²

As this clause is for the benefit of the charterer, it does not exempt the ship from her obligation to proceed to the loading port with reasonable dispatch. If she loiters by the wayside, she is responsible to the charterer in damages, even though she should arrive before the canceling date.³

The charter party usually provides that the vessel can only be ordered to a safe port, where she can lie always afloat. This provision is common both to loading and discharging. It means safely afloat when loaded. Under it a ship is not required to lighten her cargo, or lie at a dangerous anchorage.⁴

LOADING UNDER CHARTER PARTIES.

87. Delay beyond the time allowed entitles the ship to demurrage. Sundays and legal holidays are then counted under the ordinary form of charter party.

§ 86. ¹ *Smith v. Dart*, 14 Q. B. Div. 105.

² *Groves v. Volkart*, 1 Cab. & E. 309; *Crow v. Myers* (D. C.) 41 Fed. 806; *Stanton v. Richardson*, 45 Law J. Exch. 78; *Disney v. Furness, Withy & Co.* (D. C.) 79 Fed. 810.

³ *The March* (D. C.) 25 Fed. 106; *McAndrew v. Adams*, 1 Bing. N. C. 29, 27 E. C. L. 297.

⁴ *The Gazelle*, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496; *Shield v. Wilkin*, 5 Exch. 304; *The Alhambra*, 6 Prob. Div. 68.

The charter party provides that the charterers have a certain number of days for loading, Sundays and legal holidays excepted, and must pay demurrage at a certain rate per ton per day if vessel is longer detained. If the clause is worded in this manner, demurrage is payable for Sundays and legal holidays.¹

The reason why Sundays and holidays are excluded in counting the lay days, but included in estimating the demurrage, is that in such port work they cannot be used. But demurrage is an allowance for the time during which the ship would otherwise be on a voyage, and, as she does not stop her voyage for Sundays, every day should count. The same reasoning applies to dispatch money, which is an allowance often made the charterer for loading in less time than that permitted by the charter.

The term "working days" means all days except Sundays and legal holidays, and does not cover days during which the weather is too bad to permit work.²

Under lump-sum charters, the most fruitful source of controversy is as to the spaces on the ship which the charterer may fill. He is entitled to all spaces where cargo can be put, except the spaces necessary for the crew, coal, tackle, apparel, provisions, and furniture. The variety in the build of vessels renders it impossible to lay down any general rule. A good example of such controversies is the case of *Crow v. Myers*.³

The loading is largely governed by the custom of the port, except where inconsistent with the written contract.

§ 87. ¹ *Brown v. Johnson*, 10 Mees. & W. 331; *Red "R" S. S. Co. v. Transport Co.*, 33 C. C. A. 432, 91 Fed. 168.

² *Sorensen v. Keyser*, 2 C. C. A. 650, 52 Fed. 163; *Wood v. Keyser* (D. C.) 84 Fed. 688; *Id.*, 31 C. C. A. 358, 87 Fed. 1007.

³ (D. C.) 41 Fed. 806.

EXECUTION OF NECESSARY DOCUMENTS UNDER CHARTER PARTIES.

88. The master must sign the bills of lading and other necessary documents.

Most charter parties require the master to sign bills of lading as presented by the charterer for the different parts of the cargo as received on board, and drafts for the disbursements made by the charterers to pay the vessel's bills when in port, and for the difference between the charter party freight and the freight as per bills of lading. All these are important documents. The amount necessary to clear a single large ship runs up into the tens of thousands. As charterers with a large business may have several on the berth loading at once, the capital necessary for their use would be enormous. Hence these documents are needed by him and his shippers for obtaining discounts from his banker. Thus, a man who sees an opportunity to ship a thousand bales of cotton to Liverpool, where he can sell it at an advance, can buy it on this side, engage freight room from some charterer who has a ship in port or expected, get a bill of lading for it to order, draw on his Liverpool consignee, attaching the bill of lading to the draft, and get his draft at once discounted at his bank.

Under the usage of trade, the freight is payable at the port of discharge, and is collected by the vessel owner. If the charterer has sublet the room to different shippers for more than he has agreed to pay the owner for the use of his ship, the owner will owe him the difference. This is calculated at the loading port on the completion of the loading, and the master gives the charterer a draft on his owners for the amount. If the cargo has started from inland points, and the charterer has to pay accrued charges of previous carriers (for the last carrier pays the charges of the previous carriers), the draft may be very great; but,

if it all starts from the loading port, so narrow are the margins of profit in modern trade that the draft is small. A recalcitrant captain may be compelled to sign these important papers.¹

CESSER CLAUSE IN CHARTER PARTIES.

89. Under the cesser clause, the settlement between ship and charterer must be made at the loading port, and the shipper looks to the ship alone, and not to the charterer.

A curious provision in modern charter parties is the clause known as the "cesser" clause. Its usual language is "owner to have a lien on the cargo for freight, dead freight, and demurrage, charterer's liability to cease when cargo shipped." It is strictly construed. It does not operate to release the ship, and it releases the charterer from liability for future occurrences alone, not for past occurrences.¹

The object is to end the charterer's liability at the loading port, and save him from a lawsuit at a distant point. To that end the bills of lading are given direct by the ship to the shipper, and all disputes as to demurrage, dead freight, etc., at the loading port, are settled before the vessel sails, while the lien given to the owner protects his freight or demurrage at the port of discharge. Hence, if the owner gives the shipper a clean bill of lading at the loading port, he cannot hold the goods for demurrage; for the shipper is not bound by the charter party. He must collect his demurrage, or reserve a lien for it, by proper language, in his bill of lading.

§ 88. ¹ *The Joseph*, 2 Hughes, 58, Fed. Cas. No. 11,730.

§ 89. ¹ *KISH v. CORY*, L. R. 10 Q. B. 553; *The Iona*, 26 C. C. A. 261, 80 Fed. 933; *Schmidt v. Keyser*, 32 C. C. A. 121, 88 Fed. 799; *Crossinan v. Burrill*, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106.

CHAPTER VIII.

OF WATER CARRIAGE AS AFFECTED BY THE HARTER ACT OF FEBRUARY 13, 1893 (27 Stat. 445).

90-91. Policy of Act.

- 92. Act Applicable Only between Vessel Owner and Shipper.
- 93. Vessels and Voyages to which Act is Applicable.
- 94. Distinction between Improper Loading and Negligent Navigation.
- 95. Necessity of Stipulation to Reduce Liability for Unseaworthiness.

POLICY OF ACT.

90. The act materially modifies the law relating to the carriage of goods.

91. It forbids any stipulation against negligence in preparation for the voyage or in delivery, or unseaworthiness below the measure of due diligence.

The discussion in the preceding chapter has been as to the liability of carriers under the general decisions of the courts, independent of statute. As has been seen, stipulations against negligence are forbidden by the preponderance of American decisions, but allowed by the English decisions. As a large proportion of the foreign carrying trade is conducted in English vessels, the effect of the English decisions is to allow vessel owners to fritter away their liability by stipulation, and this placed American vessel owners at a disadvantage in the close competition between them. The Harter act was a compromise between the shipping and carrying interests, and though it exempts carrying vessels from liability for many acts of negligence for which they were responsible formerly, and against which they

could not stipulate, it at the same time works in favor of the shipper by forbidding many stipulations which under the English law were valid. The general policy of the law is that the vessel owner must take the care required of experts in that business in all matters relating to the loading, stowage, custody, care, and proper delivery of the goods intrusted to it, and must exercise due diligence to make the vessel seaworthy in all the particulars which have been held to constitute seaworthiness; and that, if these requirements are met entirely, neither the vessel nor her owners shall be responsible even for faults or errors in navigation, nor for such accidents as have been held by the American decisions to be validly stipulated against in bills of lading.

The full text of the act is as follows:

“Chapter 105. An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

“Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

“Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading

or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

“Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

“Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading or shipping document, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transporta-

tion, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

"Sec. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner, or master is guilty of such violation, and such vessel may be libelled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States.

"Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statutes defining the liability of vessels, their owners or representatives.

"Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

"Sec. 8. This act shall take effect from and after the first day of July, eighteen hundred and ninety-three. Approved February 13, 1893."

**ACT APPLICABLE ONLY BETWEEN VESSEL
OWNER AND SHIPPER.**

92. The act is intended only to regulate the relations between vessel and shipper, and not to affect the relations of either to third parties.

In referring to the act generally, it is first to be observed, when the title and all of its provisions are taken together, that it is only intended to affect the relations between vessel owner and shipper. Accordingly in THE DELA-

WARE,¹ which was a case of a collision between two vessels, in which the wrongdoing vessel claimed that the general language of the third section of the act exempted it from liability to the other vessel, the court held that such was not its intention; that it was not at all intended to affect the relations of any other parties than shipper and carrier.

As to the general policy of the act, the supreme court in its opinion used the following language: "It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability, which had been held by the courts of England, if not of this country, to be valid as contracts, and to be respected even when they exempt the ship from the consequences of her own negligence. As decisions were made by the courts from time to time, holding the vessel for nonexcepted liabilities, new clauses were inserted in the bills of lading to meet these decisions, until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand, and suggested amendments to the maritime law in line with those embodied in the

§ 92. ¹ 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

Harter act. The exigencies which led to the passage of the act are graphically set forth in a petition addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury, and embodied in a report of the committee on interstate and foreign commerce of the house of representatives."

In the later case of *The Irrawaddy*,² the court uses the following language in reference to the purpose of the act: "Plainly, the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in the event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship? Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the federal courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage, as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due dili-

² 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130.

gence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty. Although the foundation of the rule that forbade shipowners to contract for exemption from liability for negligence in their agents and employés was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared."

This case also illustrates the doctrine that the act was not intended to affect the rights of the vessel to third parties. The vessel had met with a disaster from some fault in navigation of her crew, and the vessel owner contended that, as he was no longer liable under the act for the negligence of his crew in this respect, he ought to be entitled to recover against the cargo owner in general average for such loss. The supreme court, however, held that it did not give him the right to assert a claim for general average against the cargo arising out of the negligence of his own crew.

VESSELS AND VOYAGES TO WHICH ACT IS APPLICABLE.

93. The test as to vessels which come under this act is not based upon their nationality, but upon their voyages.

In the first two sections, the voyages covered by the act are those between ports of the United States and foreign countries, and, if the voyage in question is between these ports, the act applies both to American and foreign vessels.¹

§ 93. ¹ *The Chattahoochee*, 173 U. S. 340, 19 Sup. Ct. 491, 43 L. Ed. 801; *Knott v. Botany Worsted Mills*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90.

These sections, therefore, in the cases to which they applied, put American and foreign vessels on an exact equality; but it was necessary to go further than this. Had the law stopped at that point, American vessels in foreign ports would have had a great advantage over American vessels in the coasting trade, as the latter could not have stipulated against liability. Hence the third section, which exempts vessels from negligence in navigation and from liability, irrespective of negligence for perils of the sea and other particulars which common carriers could stipulate against, applies not only to voyages between American and foreign ports, but to all voyages from American ports, even though to other American ports.²

Nor was the act intended to apply to any but carriers of goods. Passenger carriers are not affected by it.³

DISTINCTION BETWEEN IMPROPER LOADING AND NEGLIGENT NAVIGATION.

94. Independent of stipulation, the act exempts the vessel owner from the consequences of negligent navigation and other grounds of liability against which he could contract under American law.

The main questions under the act have arisen in connection with the first three sections. Its general scheme is to make the vessel liable for faults in connection with the ordinary shipment and stowage of the cargo, but to allow her to exempt herself from liability for mere negligence in navigation after the voyage commences. It is not always easy to draw the line between the two classes.

² The *E. A. Shores, Jr.* (D. C.) 73 Fed. 342; *In re Piper Aden Goodall Co.* (D. C.) 86 Fed. 670.

³ *Moses v. Packet Co.* (D. C.) 88 Fed. 329; *Id.*, 34 C. C. A. 687, 92 Fed. 1021.

In the case of *Calderon v. Steamship Co.*,¹ a vessel on a voyage from New York to certain West India ports put some goods designed for one port in a compartment beneath goods designed for a second port. Hence, when she reached the first port, the goods could not be found, and were carried past their destination. At the second port they were found, but the vessel came back on her trip to New York, and the goods were lost. The court held that this was not a fault of navigation, but a fault in proper delivery, and that, therefore, the vessel was liable, and the bill of lading could not stipulate against such an act.

In *The Frey*,² some glycerine was so loosely stowed that it rolled around in rough weather, and injured the other cargo. The vessel was held liable.

In the case of *The Kate*,³ the crew, while loading in port, left out several stanchions, intended to support part of one of the decks, and piled up on the remaining stanchion an unusual load, and the vessel was in this condition when she sailed. The court held that this was not a fault in navigation, and that the vessel was liable.

In *The Colima*,⁴ the vessel was so loaded that she was crank in bad, though not extraordinary, weather. She was held liable.

In the case of *The Whitlieburn*,⁵ it was held that properly ballasting the ship was connected with the loading, and not the navigation, and that the vessel was liable for any injury caused by failing to attend to this.

In the case of *The Niagara*,⁶ a vessel which went to sea with a defective mechanical horn was held not properly equipped (or seaworthy in the technical sense), and there-

§ 94. 1 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033.

2 (D. C.) 92 Fed. 667.

3 (D. C.) 91 Fed. 679.

4 (D. C.) 82 Fed. 665.

5 (D. C.) 89 Fed. 526.

6 28 C. C. A. 528, 84 Fed. 902.

fore that she was liable to the cargo for any damage caused thereby.

The burden to prove proper seaworthiness or equipment is on the carrier.

Some of the nicest questions in connection with the act have arisen in reference to the proper management of her portholes. The question as to responsibility for leaving a porthole open or insecurely fastened at sailing depends largely upon its location, and upon the question whether harm could reasonably be expected to come from leaving it open.

In *The Silvia*,⁷ a porthole was knowingly left open by the crew at the time of the vessel's sailing, and care was taken not to block it by cargo, so that in case of necessity, when the vessel went to sea, it could have been easily closed. The porthole itself was without defect. At sea the crew forgot to close it, and some of the goods were injured. The court held that this was a fault of navigation, and did not render the vessel unseaworthy.

On the other hand, in the case of *The Manitoba*,⁸ a porthole was unintentionally left insecure at the time of sailing. Judge Brown held that this was a fault connected with the ordinary loading, and was not an act of navigation, and that the ship was liable. It is commended as an interesting discussion of the difference between the two cases.

In the English case of *Dobell v. Steamship Rossmore Co.*,⁹ the porthole was not only left open, but cargo was packed against it, so that it could not have been closed at sea. The court held that under these circumstances it was a fault in loading, and not in navigation, and that the vessel was liable.

The vessel which is so stowed that she is down by the

⁷ 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241.

⁸ (D. C.) 104 Fed. 145.

⁹ [1895] 2 Q. B. 408.

head, causing the cargo to run forward, is liable for the consequences.¹⁰

On the other hand, where water ballast in being pumped out injured the cargo, owing to the fact that the crew in pumping negligently left a valve open, the machinery itself being in perfect order, this was held a fault in navigation, and the vessel was not liable.¹¹

And lack of attention to the vessel's pumps while on a voyage, by which cargo was injured, the pumps themselves being in good order, is a fault in navigation, for which the vessel is not liable under the act.¹² Breaking adrift and causing damage to cargo, because the pilot anchored the vessel in a bad place, was a fault of navigation, for which the ship was not liable.¹³

So a vessel which was injured on a voyage, and taken to an intermediate port for repairs, was not liable for subsequent damage from the failure to make the repairs sufficiently extensive, owing to a lack of judgment of the master.¹⁴

NECESSITY OF STIPULATION TO REDUCE LIABILITY FOR UNSEAWORTHINESS.

95. The act permits the shipowner to reduce his warranty of seaworthiness to the measure of reasonable diligence by proper stipulations, but does not have this effect proprio vigore.

¹⁰ *Botany Worsted Mills v. Knott* (D. C.) 76 Fed. 582; *Id.*, 27 C. C. A. 326, 82 Fed. 471; *Id.*, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90.

¹¹ *The Mexican Prince* (D. C.) 82 Fed. 484; *Id.*, 34 C. C. A. 168, 91 Fed. 1003.

¹² *The British King* (D. C.) 89 Fed. 872.

¹³ *The Etona*, 18 C. C. A. 380, 71 Fed. 895.

¹⁴ *The Guadeloupe* (D. C.) 92 Fed. 670.

Probably the most interesting case that has been decided so far upon the act is that of *THE CARIB PRINCE*.¹ There, a defective rivet which had existed from the very construction of the ship, and was not discoverable by the utmost care, caused by leakage a damage to the cargo. Under the decisions relating to seaworthiness independent of the act, this was a latent defect, and the owner was solely responsible under his implied warranty of seaworthiness. The vessel owner asserted exemption, first, on the ground that his bill of lading contained a clause against such unseaworthiness, by which he was released from liability; and, second, he contended that the language of the Harter act itself, even if the bill of lading did not mean what he said, exempted him from every defect in the vessel not discoverable by due diligence. The supreme court, however, held, as to the first point, that his bill of lading, properly construed, was not intended to cover defects in the vessel existing at the time of sailing, but only those subsequently arising. In reference to his second defense, it held that the act did not, by force of its own language, reduce the liability for unseaworthiness to the measure of due diligence, when no contract was made, but merely gave the vessel owner the right, by contract properly worded, to so reduce his liability. Hence it held the vessel liable under his implied warranty of seaworthiness, independent of the statute, as he had not by contract protected himself against it.

§ 95. ¹ 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181.

HUGHES, AD.—12

CHAPTER IX.

OF ADMIRALTY JURISDICTION IN MATTERS OF TORT.

- 96-97. The Waters Included, and Wharves, Piers, and Bridges.
- 98. Torts, to be Marine, must be Consummate on Water.
- 99. Torts may be Marine though Primal Cause on Land.
- 100. Detached Structures in Navigable Waters.
- 101. Torts Arising from Relation of Crew to Vessel or Owner.
- 102. Personal Torts Arising from Relation of Passengers to Vessel.
- 103. Obligations to Persons Rightfully on Vessel, but Bearing no Relation to It.
- 104. Liability as between Vessel and Independent Contractor.
- 105. Doctrine of Imputed Negligence.
- 106. Assaults, etc.
- 107. Doctrine of Contributory Negligence.

THE WATERS INCLUDED, AND WHARVES, PIERS,
AND BRIDGES.

- 96. The test of jurisdiction in matters of tort is the locality.
- 97. This includes navigable waters, natural and artificial, in their average state, but does not include wharves, piers, or bridges attached to the shore.

We have already seen that the test of jurisdiction in matters of tort is the locality, and therefore we must first consider what is meant by this test, and what waters it includes; and we must then take up the various torts cognizable in admiralty. They may be subdivided into torts to the person and torts to property; and torts to the person may be further subdivided, for convenience of discussion, into torts not resulting in death and those resulting in death.

The admiralty jurisdiction in matters of tort exists over all navigable waters, as explained in a previous connection.¹ This includes canals.² But it includes only navigable waters in their usual state. For instance, a stream that is navigable at ordinary tides is none the less within the jurisdiction because it happens to be bare at an unusually low tide; and, conversely, when a navigable river is widened by freshets far beyond its usual banks, and overspreads the adjoining country on either side, it does not carry admiralty jurisdiction with it. Hence, in the case of *The Arkansas*,³ a steamer which, during a flood, was far out of the regular channel, and collided with a house, which was usually inland, was held to have committed no marine tort.

The line is frequently narrow between the navigable waters and structures bridged over them. Anything that is attached to the shore, although the water may be beneath it, is considered as a mere projection of the shore, and torts happening upon such structures are not within the jurisdiction of the admiralty court. This applies more especially to wharves and bridges, which are fixed structures.

In the case of *The Professor Morse*,⁴ a marine railway attached to the shore projected out into navigable water; that portion which was intended to raise ships being under water. A passing schooner injured this portion. The owner of the railway libeled the schooner, but the court dismissed the libel for want of jurisdiction.

For the same reason injuries to a wharf, or bridge, or pier by a vessel running into it cannot be recovered in admiralty, as they are considered to have happened on land.⁵

§§ 96-97. ¹ Ante, pp. 8-12.

² Ex parte Boyer, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1053.

³ (D. C.) 17 Fed. 383.

⁴ (D. C.) 23 Fed. 803.

⁵ The Neil Cochran, Fed. Cas. No. 10,987; *THE JOHN C. SWEENEY* (D. C.) 55 Fed. 540.

In the case of *The Haxby*,⁶ a vessel collided with a pier, and knocked into the water property of some value, which fell on account of the injury to the wharf. It was held that, even though this property, after the injury to the wharf, fell into what otherwise would constitute navigable water, that did not bring the case into the jurisdiction of the admiralty courts. Conversely, if a ship is injured by the negligence of a bridge owner, as by failure to open a draw in time, the vessel owner may sue the bridge owner in personam in the admiralty, since the vessel is a floating structure, and the injury, though it commenced on the land, was consummate on navigable waters.⁷

For the same reason any injuries inflicted upon a ship by defects in the wharf or dock are within the maritime jurisdiction, and the wharfinger may be sued in personam to recover damages occasioned thereby.⁸

This right of the vessel owner, however, is limited to a suit in personam against the wharfinger or bridge owner. Such a structure is not a maritime instrument, cannot be the subject of a maritime lien, and cannot be liable in rem.⁹

TORTS, TO BE MARINE, MUST BE CONSUMMATE ON WATER.

98. In order for a tort to be within the jurisdiction of the admiralty, it must be consummate on navigable water. The fact that it commences upon the water does not give jurisdiction if the injury itself was inflicted on the shore.

⁶ (D. C.) 94 Fed. 1016; *Id.* 95 Fed. 170.

⁷ *The Zeta* [1893] App. Cas. 468; *Ball v. Trenholm* (D. C.) 45 Fed. 588; *Greenwood v. Town of Westport* (D. C.) 60 Fed. 560; *Panama R. Co. v. Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004.

⁸ *Smith v. Burnett*, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756.

⁹ *IN RE ROCK ISLAND BRIDGE*, 6 Wall. 213, 18 L. Ed. 753.

This may be illustrated by some of the decided cases.

In the leading case of *THE PLYMOUTH*,¹ a ship lying at a wharf caught on fire, and the fire communicated to buildings on the shore. The owner of the buildings contended that the vessel owner, or his agent, was negligent in the origin of the fire, and sued the owners of the ship in admiralty for the damages caused. The court, however, held that, as the right of action was not complete until the buildings were injured, and as the buildings were a part of the shore, and therefore the injury was inflicted upon the shore, there was no jurisdiction in the case.

This principle was afterwards applied in the case of *EX PARTE PHENIX INS. CO.*²

In the case of *Johnson v. Chicago & P. Elevator Co.*,³ the jib boom of a schooner, which was being docked at a wharf, and which projected over the wharf, struck a warehouse on the wharf, and did great damage. A libel to recover these damages was dismissed for want of jurisdiction.

In *The Mary Stewart*,⁴ a ship was loading cotton, which was being carried aboard by slings while the ship was lying alongside the wharf. One of the bales fell while being hoisted aboard and before it crossed the ship's rail, and injured a workman standing on the wharf. He libeled the ship for damages, but the court held that admiralty had no jurisdiction of the cause of action.

In *The H. S. Pickands*,⁵ a workman on a ladder which rested on the wharf, and extended up the ship's side, was injured by its slipping. The court denied its jurisdiction.

In the case of *Bain v. Sandusky Transp. Co.*,⁶ seamen who had left their ship were arrested ashore as deserters. They

§ 98. 1 3 Wall. 20, 18 L. Ed. 125.

2 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274.

3 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 477.

4 (D. C.) 10 Fed. 137. ✓

5 (D. C.) 42 Fed. 239.

6 (D. C.) 60 Fed. 912.

sued in admiralty for a false arrest, but the court held that there was no jurisdiction.

TORTS MAY BE MARINE, THOUGH PRIMAL CAUSE ON LAND.

99. The converse of the above proposition is also true,—that, where the injury is consummate on the ship, admiralty has jurisdiction, though its primal cause was on the land.

In the case of *Herman v. Port Blakely Mill Co.*,¹ a laborer working in the hold of a vessel was injured by a piece of lumber sent down through a chute by a person working on the pier. It was held that admiralty had jurisdiction of such an action.

In *The Strabo*,² a workman attempted to leave a ship by a rope on the ship, which was not securely fastened. In consequence, he fell, being partly injured before he struck the dock, but mainly by striking the dock. Judge Thomas, in an opinion reviewing and classifying the authorities, upheld the jurisdiction on the ground that the ladder was on the ship, the man himself was on the ship when he started in his fall, that there was some injury before he struck the ground, and that a mere aggravation of the injury after he struck the ground did not prevent the jurisdiction from attaching. On appeal his decision was affirmed.

DETACHED STRUCTURES IN NAVIGABLE WATERS.

100. Detached piers, piles, or structures attached to the bottom, but surrounded by water, are within the jurisdiction.

§ 99. ¹ (D. C.) 69 Fed. 646.

² (D. C.) 90 Fed. 110; *Id.*, 39 C. C. A. 375, 98 Fed. 998.

The principle that wharves, bridges, and piers are parts of the shore applies to those which are attached directly or intermediately through others to the bank or shore line. But piles and structures attached to the bottom and surrounded by water are within navigable waters, and admiralty has jurisdiction of suits for injuries inflicted by them. On principle it ought also to have jurisdiction of suits for injuries received by them, as they can hardly be considered extensions of the shore.

In the case of *Philadelphia & Havre de Grace Steam Tow-boat Co. v. Philadelphia & W. B. R. Co.*,¹ a pile driven in a channel of a navigable river inflicted injuries upon a tug navigating the river. It was held that this cause of action was cognizable in the admiralty.

In *ATLEE v. UNION PACKET CO.*,² a pier erected in a navigable stream, and unlawfully obstructing navigation, inflicted injuries upon a barge navigating the river. The court held that jurisdiction attached in such case.

And there are many instances in the books of suits for damages caused by sunken anchors or wrecks attached to the bottom.³ In England it has been decided that suits for damage done by ships to oyster grounds under navigable waters are within the jurisdiction, but the decision turns somewhat on the language of their statute.⁴

TORTS ARISING FROM RELATION OF CREW TO VESSEL OR OWNER.

101. The relation between the crew and the ship or her owners is substantially the same as the relation between master and servant at

§ 100. ¹ Fed. Cas. No. 11,085; Id., 23 How. 209, 16 L. Ed. 433.

² 21 Wall. 389, 22 L. Ed. 619.

³ *The Utopia* [1893] App. Cas. 492; *Ball v. Berwind* (D. C.) 29 Fed. 541; *The Snark* [1900] Prob. Div. 105.

⁴ *The Swift* [1901] Prob. Div. 168.

common law, in so far as it bears upon the question of torts to the person.

The common-law doctrine of fellow servants applies in such case. The master owes to the seamen the nonassignable duties arising from that law, and the seamen cannot recover except for a violation of this nonassignable duty, and except under the same circumstances as would make the tort actionable at common law. This doctrine as to admiralty is well summarized in the case of *OLSEN v. OREGON COAL & NAVIGATION CO.*,¹ where the court says:

"The question, then, is whether the defendant, as owner, is liable for this act of negligence on the part of the master. It will be readily conceded that no cause of action is stated against the defendant unless the libel shows upon its face that the defendant failed to perform some positive duty which it owed to the libelant as its employé. The duties which the owner of a ship owes to the seamen employed in its service are to see that the ship is seaworthy, properly manned, and equipped with all necessary appliances for the seamen's safety, and for the use of the ship; to provide them with sufficient food, and with medical attendance and care in case of sickness; to use due care in the selection of the master and other officers of the ship; and he may also, under the general principles which govern the relation of master and servant, owe certain special duties to minors and seamen known to be inexperienced.

"Is there anything in the libel which can be construed as a charge that the defendant failed in the performance of any of these duties? I think not. The negligence complained of, namely, leaving uncovered the hatchway into which the libelant fell, was that of the master or other officer whose duty it was to see that it was properly closed with the cover provided for that purpose by the defendant. Assuming this

§ 101. ¹ (D. C.) 96 Fed. 109; *Id.*, 44 C. C. A. 51, 104 Fed. 574.

to have been the fault of the master, it was the negligence of a fellow servant of the libelant, for which the defendant, as owner of the steamer, is not liable to respond in damages. While it is true that the master of a ship is a servant of higher grade than that of a seaman, and represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, still in all matters pertaining to the navigation of the ship the master and seamen are fellow servants, engaged in one common employment, and each assumes the risk of the other's negligence in the discharge of the duties incident to such employment.

* * * And, conceding that it was negligence on the part of the master to permit the hatchway to remain uncovered, still it was not negligence against which the owner of the steamer was required to guard. The law does not impose upon the owner of a vessel the duty of keeping its hatchways closed, when at sea, for the protection of the seamen on board. It is one of the ordinary duties of the master, or other officer having charge of the deck, to see that they are closed at all proper times, and the seaman assumes the risk or danger which may attend upon the negligent omission of the master or other officer to perform his duty in this respect."

In *The City of Alexandria* ² the court says: "It was neglect of the officers or men aboard in the performance of their ordinary duties; a neglect against which the owners could not possibly guard. Those who engage in a common employment take upon themselves all the natural and ordinary risks and perils incident to the performance of their duties. Among these are the perils arising from the carelessness and negligence of others who are engaged in the same employment; and it constitutes no exception to the rule that the several persons employed are not in equal station or authority, or that one servant is injured through the negligence

² (D. C.) 17 Fed. 390.

of another who is his superior in station, to whom he owes obedience. * * * The navigation of a ship from one port to another constitutes one common undertaking or employment, for which all the ship's company in their several stations are alike employed. Each is in some way essential to the other, in furtherance of the common object, viz. the prosecution of the voyage. Each one, therefore, upon the principles laid down in the common-law courts, takes the risk of any negligence in the performance of his duties by any of his associates in the common employment; and on common-law principles, therefore, the libellant's claim could not be sustained."

Accordingly, the master and the seamen, the mate and the seamen, and the seamen among each other are fellow servants, and cannot recover for each other's negligence, though they may for negligence of the owner's nonassignable duties.³

PERSONAL TORTS ARISING FROM RELATION OF PASSENGERS TO VESSEL.

102. The relation between the passengers and the ship or her owners is governed by the general law of passenger carriers, except in so far as it is modified by statute.

The federal statutes contain many provisions looking to the safety of passengers and their accommodations. Chapter 6, tit. 48, of the Revised Statutes (sections 4252-4289), and chapter 2, tit. 52, of the Revised Statutes (sections 4463-4500), contain these provisions in detail. They contain, in

³ *Grimsley v. Hankins* (D. C.) 46 Fed. 400; *The Job T. Wilson* (D. C.) 84 Fed. 204; *The Queen* (D. C.) 40 Fed. 694; *The Miami*, 35 C. C. A. 281, 93 Fed. 218; *Carlson v. Association* (D. C.) 93 Fed. 468; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656.

general, regulations to insure a skillful crew, limitation of the number of passengers carried, many provisions against fire, requirements for boats, life-preservers, and other appliances necessary in wrecks, and they prescribe heavy penalties for a violation of any of these provisions. But, outside of these statutes, any improper treatment of a passenger by any of the crew inflicted within the line of his duty is the subject of an action. For instance, in the case of *The Willamette Valley*,¹ a passenger was allowed to recover damages for refusal to accept a first-class ticket and for giving him second-class accommodations.

In the case of *The Yankee*,² a vigilance committee escorted an obnoxious citizen to a ship in the harbor, and recommended him to take a sea voyage, and the ship carried him away. He sued the owners of the ship in personam, and the court sustained the jurisdiction.

A passenger may proceed in rem for any injury received aboard a ship, except assaults.³

OBLIGATIONS TO PERSONS RIGHTFULLY ON VESSEL, BUT BEARING NO RELATION TO IT.

103. Persons rightfully on a vessel are entitled to demand the exercise of ordinary care towards them on the part of the vessel, under the doctrine of implied invitation.

In the case of *LEATHERS v. BLESSING*,¹ a patron of a steamer, who was expecting some cargo by her, went aboard to make inquiries about it, and was injured by a bale of cotton falling on him. He libeled in personam, and the court allowed a recovery.

§ 102. ¹ (D. C.) 71 Fed. 712.

² Fed. Cas. No. 18,124, 1 McAll. 467.

³ *The City of Panama*, 101 U. S. 462, 25 L. Ed. 453.

§ 103. ¹ 105 U. S. 626, 26 L. Ed. 1192.

The most frequent cases of this sort are those of laborers employed in and about a vessel in port. For instance, suppose that stevedores are employed as independent contractors to load or discharge a vessel, whether by the vessel herself or her charterers. In such case the vessel is not responsible for the acts of the stevedores' men causing damage.²

The vessel would be responsible for the act of a member of its crew if acting at the time in its service, though not if acting at the time in the stevedore's service.³

If the vessel is properly fitted up and constructed as usual, she is not responsible to any one who falls into one of her ordinary openings. These questions have frequently arisen in the case of men falling into open hatchways.

The duties and obligation of the vessel in reference to open hatchways have been the subject of much litigation. It has frequently been held that, so far as the crew of a vessel is concerned, and as regards workmen upon the vessel, like stevedores or their employés, it is not negligence to leave a hatchway open. Such men are supposed to be familiar with the construction of a ship, and to know that hatchways are necessary structures, and are made to be left open for the purpose of loading. If, therefore, the construction of the ship and its hatchways is proper, and there is no such defect about them as could be discoverable by the exercise of ordinary care, the fact that they are left open would not give a right of action against the ship, unless they were left open at a point where the laborers upon a ship would not naturally expect to find them open, and had no rail or guard rope around them, or light to indicate their existence. As the cases well say, the doctrine of holes in highways or places where people are accustomed to resort has no appli-

² *THE INDRANI*, 41 C. C. A. 511, 101 Fed. 596.

³ *The Joseph John*, 30 C. C. A. 199, 86 Fed. 471; *The Joseph B. Thomas*, 30 C. C. A. 333, 86 Fed. 658, 46 L. R. A. 58.

cation to such places, for the deck of a ship is not a highway, and men experienced in loading ships are assumed to take the risk of such ordinary openings as would be expected to exist upon a ship. If the hatchway was in every respect proper as far as the construction goes, and there was no negligence in uncovering it, and not properly guarding it, and this was done by the stevedore as an independent contractor, the ship would not be liable for his act.⁴

A hatchway left open by some one connected with the ship may, however, cause injuries to a passenger which would entitle him to sue where the crew or stevedores could not, because a passenger is not supposed to be as familiar with the construction of a ship as such men, and the measure of duty of a carrier towards a passenger is a much higher one. If there is an unguarded opening in parts of the ship where passengers are permitted to go, and an injury is received in consequence, the passenger could proceed against the ship.⁵

LIABILITY AS BETWEEN VESSEL AND INDEPENDENT CONTRACTOR.

104. The vessel is not liable for injuries caused by independent contractors ; probably not even when its tackle is being used by the contractor, and breaks in the use.

Frequently, when charterers are loading a ship, the charter party provides that the steamer is to furnish use of tackle and engines. In such case, if the stevedore is an employé,

⁴ The Jersey City (D. C.) 46 Fed. 134; Horne v. George H. Hammond Co., 18 C. C. A. 54, 71 Fed. 314; Claus v. Steamship Co., 32 C. C. A. 282, 89 Fed. 646; Dwyer v. Steamship Co. (C. C.) 4 Fed. 493; The Saratoga (D. C.) 87 Fed. 349; Id., 36 C. C. A. 208, 94 Fed. 221; The Auchanardeh (D. C.) 100 Fed. 895; Roymann v. Brown, 44 C. C. A. 464, 105 Fed. 250; THE INDRANI, 41 C. C. A. 511, 101 Fed. 596.

⁵ The Furnessia (D. C.) 35 Fed. 798.

and not an independent contractor, the ship is responsible for injuries caused by lack of reasonable care in selecting suitable appliances, just as any master is liable to his servant under such circumstances.¹

But suppose that the ship makes such a contract with the charterer to allow the use of its tackle, and the stevedore is an independent contractor, selecting his own men. Suppose that in such case, while the stevedore is working with the ship's tackle, one of his men is injured by a defect in that tackle, due to the lack of reasonable care in selection or inspection. In such case it would seem, on principle, that the ship ought not to be liable. Certainly, the doctrine of implied invitation has nothing to do with such a case. On the other hand, her contract to furnish her tackle is with the charterer, not with the laborer, and raises no privity between him and the ship. Nothing can well be said to be absolutely defective. A ship which is unseaworthy on the ocean may be perfectly safe on a river. An old rope or chain may be perfectly safe to raise a keg, and break in raising a hogshead. Its unsafeness is largely in its use, and hence, as the stevedore decides how to use it, and how much strain to put on it, it seems unjust to go against the ship in the event of its breaking. And, back of all that, a cause of action arises out of a breach of duty. A ship owes no duty to the employes of an independent contractor, except the general duties owed to every one.²

Accordingly, it was held in *The Mary Stewart* ³ that the ship was not liable to a laborer who, while engaged in loading the ship, was injured by a bale of cotton falling on him, due to the breaking of a rope furnished by the ship.

In *The Dago* ⁴ the same decision was rendered on a sim-

§ 104. ¹ *The Elton*, 31 C. C. A. 496, 83 Fed. 519.

² *Bibb's Adm'r v. Railroad Co.*, 87 Va. 711, 14 S. E. 163; *Murray v. Currie*, L. R. 6 C. P. 24.

³ (D. C.) 10 Fed. 137.

⁴ (C. C.) 31 Fed. 574.

ilar state of facts, though the court placed its decision mainly on the fact that there was nothing to indicate any defect in the rope.

The most interesting decisions on this question have been in the English courts. In the case of *Heaven v. Pender*,⁵ a dock company erected a staging around a ship under a contract with the shipowner. A man employed by the shipowner to paint the ship fell in consequence of the giving way of this staging. He sued the dock company. Justices Field and Cave, of the queen's bench, held that there was no privity between him and the dock company, and that he could not recover. The case was taken to the court of appeals, where this decision was reversed, and he was allowed to recover.

But in the recent case of *CALEDONIAN RY. CO. v. MULHOLLAND* ⁶ this case was much limited, and placed on the ground that the party was impliedly invited to come on its premises by the dry-dock company, and to use this staging, and that it was in its condition a trap, thus bringing the case under another well-known principle of the law of torts.

The case of *CALEDONIAN RY. CO. v. MULHOLLAND* is interesting as bearing out this distinction. There a railway company contracted with a gas company to deliver coal at a certain point. Two coal cars were delivered at that point to another company, which received them for the gas company. While in charge of the second company, one of its servants was killed, owing to the fact that the brakes were out of order, and could not stop the cars. His administrator sued the first company on account of this defect in their cars, but the house of lords held that the first company owed him no duty, and that he could not recover.

⁵ 9 Q. B. Div. 302.

⁶ [1898] App. Cas. 216.

DOCTRINE OF IMPUTED NEGLIGENCE.

105. Negligence on the part of a vessel is not now imputable to a person injured while on board the vessel, but who is not connected with its management or navigation.

The doctrine of imputed negligence, by which a person on one ship or vehicle, though not identified with its management or navigation, is chargeable with the negligence of his own vehicle, and cannot, in case of such negligence, proceed against the other vessel if also negligent, has been repudiated by the modern authorities. As the law now stands, a person injured on a vessel in collision can proceed against either or both as either or both are negligent.¹

ASSAULTS, ETC.

106. Admiralty has jurisdiction of assaults or abduction upon waters within its cognizance.

Under admiralty rule 16 there is no remedy in rem against the ship for such assaults, but there would be against the owner if the assault was made by any of the crew within the course of his employment, and there certainly would be against the man who makes the assault.¹

§ 105. ¹ New York, P. & N. R. R. Co. v. Cooper, 85 Va. 939, 9 S. E. 321; Atlantic & D. Ry. Co. v. Ironmonger, 95 Va. 625, 27 S. E. 319; LITTLE v. HACKETT, 116 U. S. 366, 6 Sup. Ct. 391; The Bernina, 13 App. Cas. 1.

§ 106. ¹ Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575; Plummer v. Webb, 1 Ware, 69, Fed. Cas. No. 11,234; Steele v. Thacher, 1 Ware, 85, Fed. Cas. No. 13,348; Turbett v. Dunlevy, Fed. Cas. No. 14,241; The Miami, 35 C. C. A. 281, 78 Fed. 818. Whether the master, in assaulting a person aboard ship, is acting in the course of his employment,—or, in other words, whether the vessel or her

It seems, however, that, though a physical wrong done by the master of the ship is an assault, in the sense of admiralty rule 16, for which the injured party can only proceed in rem, this principle does not apply to his dog. Accordingly, where a pilot who was rightfully on board was bitten by a dog in the cabin where he had been assigned, the court allowed him to proceed in rem against the vessel.²

DOCTRINE OF CONTRIBUTORY NEGLIGENCE.

107. In awarding damages for personal injuries in admiralty, the common-law doctrine that contributory negligence bars recovery does not apply.

It will be seen, in connection with the law of collision, that, where both vessels are in fault, the damages are equally divided, regardless of the degree of fault of each vessel. In assessing damages for injuries to the person, the courts do not feel bound, as in collision cases, to divide them equally, but, even where the party hurt is more negligent than the vessel, they may award him damages. The whole matter is largely in the discretion of the court.¹

owner is responsible for a willful or intentional assault.—depends on the ordinary principles of the law of torts. As is well known, it was for a long time the doctrine of the courts that such an act was not within the course of the servant's employment, and that the master was not liable therefor, except in cases of carriers and innkeepers. Recent decisions have very much modified this doctrine, but it is hardly within the purview of this treatise to discuss it elaborately. In the last-cited case the court held that such an assault of the master upon a stowaway aboard a ship was not within his employment, and did not render the vessel or owner liable. See, on the general subject, the recent English case of *Hanson v. Waller* [1901] 1 Q. B. 390.

² *The Lord Derby* (C. C.) 17 Fed. 265.

§ 107. ¹ *The Daylesford* (D. C.) 30 Fed. 633; *THE MAX MORRIS*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586.

CHAPTER X.

OF THE RIGHT OF ACTION IN ADMIRALTY FOR INJURIES RESULTING FATALLY.

- 108. Survival of Action for Injuries Resulting in Death—The General Common Law Doctrine.
- 109. The Civil-Law Doctrine.
- 110. The Continental Doctrine.
- 111. The English Doctrine as to Survival in Admiralty.
- 112. The American Doctrine as to Survival in Admiralty—Independent of Statute.
- 113. Under State Statutes.
- 114. Under Congressional Statutes.
- 115. The Law Governing.
- 116. Effect of Contributory Negligence.
- 117. Construction of Particular Statutes.

SURVIVAL OF ACTION FOR INJURIES RESULTING IN DEATH—COMMON-LAW DOCTRINE.

- 108. By the common law there was no right of action for injuries resulting in death.
- 109. CIVIL-LAW DOCTRINE—Neither was there any such right by the civil law in case of the death of a freeman.
- 110. CONTINENTAL DOCTRINE—The Continental nations, however, recognize such a right, both on land and water, and have recognized it for probably two centuries.

The Common-Law Doctrine.

At common law there was no survival of any right of action for injuries inflicted by another causing death; the reasons assigned being that such an action was purely per-

sonal to the party injured, and that the civil injury was merged in the greater injury to the state.¹

As to the action being personal to the party injured, it is easily seen why such actions should not survive. In such cases the party may not elect to proceed, and so the avoidance of litigation is accomplished. But, even as to the injured party, this power of election does not exist when death ensues. And the whole reason ignores the fact that the party killed is not the only one injured. There are many cases where suit is brought, not for a right of action derived from the party injured, but for damages caused directly to the suitor. As a result, the common law finds itself in the absurd position of giving a right of action to the parent for the loss of the services of his son if some one beats him so severely as to disable him, but not if the beating is carried so far as to kill him. A parent may sue at common law for loss of the services of his daughter if some libertine seduces her, but not if some brute outrages and murders her. It seems to be one case where the part is greater than the whole.

When aged and indigent parents are deprived by death of the son who is supporting them, or a wife with a family of helpless children is left to feed and rear them unaided by the strong arm which has theretofore done all the labor, it is a mockery to say that only the dead was the party affected. The empty larder teaches the contrary, and the case is not analogous to those wrongs like slander or libel, which are, in nature, strictly personal.

On natural principles of equity, such wrongs should have a remedy, and the common-law doctrine cannot be justified.

The Civil-Law Doctrine.

The doctrine of the civil law on the subject is not entirely clear. In the case of *Hubgh v. New Orleans & C. R. Co.*,²

§§ 108-110. ¹ *Baker v. Bolton*, 1 Camp. 493.

² 6 La. Ann. 496, 54 Am. Dec. 565.

the supreme court of Louisiana decided that by the civil law there was no right of action for damages resulting in the death of a freeman, as the value of a freeman's body could not be estimated in damages; but that there was such a right of action in case of a slave. In the course of the opinion it is also said that the well-known passage of Grotius³ was intended to enunciate merely a duty of imperfect obligation arising from natural law, and not any requirement of municipal law. On the other hand, Judge Deady, in the case of *Holmes v. O. & C. Ry. Co.*,⁴ states that the Roman law did give such a remedy, though he cites no authority for the statement. It is probable, however, and certainly the opinion of the leading commentators, that the provisions in the ancient civil law in relation to the killing of freemen were penal, rather than civil.

The Continental Doctrine.

However this may be, the leading Continental nations, which have drawn from the civil law their principles of right and remedy, have adopted in their system of laws a remedy for such cases.

The above-cited decision from Louisiana states that the law of France allows such a remedy, though it did not feel bound to adopt the French law on the subject for Louisiana.

In Holland (long the maritime rival of England) the right of action is firmly established, and has been for centuries. It is an equitable development of the penal provisions of the civil law relating to the death of freemen.

Grotius, in his *Introduction to the Jurisprudence of Holland*,⁵ says:

"Sec. 2. But the slayer is properly bound to make com-

³ "Homicida injustus tenetur solvere impensas, si quæ factæ sunt in medicos, et iis quos occisus alere ex officio solebat, puta parentibus, uxoribus, liberis dare tantum quantum illa spes alimentorum, ratione habita ætatis occisi, valebat." 2 Grot. de J. B. c. 17.

⁴ (D. C.) 5 Fed. 75.

⁵ Book 3, c. 23 (Herbert Ed. London 1845).

pensation to the widow, children, and others, if any there be, who were usually supported by the labor of the deceased, for losses and loss of profits calculated upon the principal of annuity."

"Sec. 5. And it is to be observed that in the punishment, as well as the reconciliation, a great distinction is made between cases where homicide has been effected by assassination,—that is, secretly and treacherously, or where the criminal was aware of what he was doing,—and cases where the party was slain unawares; or where the homicide took place in a personal conflict with unlawful or forbidden, or with equal or unequal, weapons, and which has given occasion to the combat; or where, in short, the homicide did not occur from passion, but from neglect. But, as far as regards compensation, these circumstances are not taken into consideration, as it is sufficient for that purpose that it has been occasioned by the fault of some one, in which is included the neglect or unskillfulness of a physician or midwife, and the neglect or ignorance of a waggoner or skipper, or the incapacity of either in managing a ship or horses."

Vinnius, in his *Commentaries on the Institutes* (3d Ed., Amsterdam, 1659), in discussing the title of the Aquilian law, says that there was no right of action under that law for the death of a freeman; but that there was under the Cornelian law if the killing was intentional (*dolo*), but, if negligent (*culpa*), a fine was imposed; but that, if there is a question of civil remedy, the unjust slayer is required to pay the funeral and medical expenses, and such a sum to those whom the deceased was bound to support,—as, for instance, children, wife, and parents,—as their expectation of support was worth, considering his age.

J. Voet, in his *Commentary on the Pandects*, after referring to various texts of the Roman law on the subject of rights of action for personal injuries, states that in modern times this right has been extended to the case of injuries resulting in death, and gives a right of action to the chil-

dren or other relations, in which each should sue for the loss personally caused to him, not for any loss inherited from the deceased.⁶

In Germany, also, the right exists. In a decision of the German Reichsgericht, rendered in 1882,⁷ it was held that this right of action existed in favor of parents for the negligent killing of a son. The opinion cites many commentators, and traces the doctrine back for two centuries.

The law of Scotland also allows actions to the wife or family of the deceased as a development of the unwritten law of that country.⁸

As these countries administer the law substantially the same in all their courts, and do not have common-law courts with one system and other courts with another system, the doctrine with them applies on land and sea alike.

This prevalence of the doctrine among the leading Continental nations would seem to settle that it is at least sufficiently recognized to entitle it, in so far as it may be maritime in nature, to be considered a part of the general body of maritime law as administered by maritime nations. In other words, any other nation that may choose to adopt it into its jurisprudence is not making something maritime

⁶ "Nec dubium, quin ex usu hodierno, latius illa agendi potestas extensa sit; in quantum ob hominem liberum culpa occisum uxori et liberis actio datur in id, quod religioni judicantis æquum videbitur, habita ratione victus, quem occisus uxori liberisque suis aut aliis propinquis ex operis potuisset ac solitus esset subministrare. * * * Qua in re si concurrat forte uxor, parentes, liberi, alter alteri præferendus non est; sed magis unicuique in id, quanti sua interesse docet, actio danda; tum quia singuli non de pœna, sed damno sibi illato reparando contendunt; tum quia hæc actio uxori, liberis, similibusque, non qua occisi heredibus adeoque jure hereditario, sed qua læsis ex facto occidentis datur; sic ut et illis accommodanda veniat, qui defuncto heredes esse ab intestato non potuerunt, vel occisi hereditatem, utpote suspectam noluerent adire." Volume 1 (Ed. 1723) p. 542.

⁷ Entscheidungen des R. G. in Civilsachen, vol. 7, p. 139.

⁸ Bell, Comm. § 2029; Clarke v. Coal Co. [1891] App. Cas. 412.

that was not maritime before, is not extending the limits of the general maritime law, but is merely drawing from that fountain something that was there already.

THE ENGLISH DOCTRINE AS TO SURVIVAL IN ADMIRALTY.

111. In England there is no right of action in admiralty for injuries resulting in death.

The English courts recognized no such right in the admiralty equally as at law. Lord Campbell's act ¹ did away with this doctrine of the common law, and gave a right of action to the personal representative for the benefit of the wife, husband, parent, or child for the injury done to them, not for any injury to the deceased inherited by them. The act expressly excepted Scotland, for the reason, above explained, that the right already existed there.

It was long a question in England whether this statute was intended to apply to the admiralty courts. After much fluctuation, it was finally settled by the house of lords in the case of *THE VERA CRUZ*,² decided in 1884, that the language of the English act contemplated only suits in the common-law courts, as was evident from the provisions in relation to juries, and that neither that act, nor the other acts giving the admiralty courts jurisdiction in case of "claims for damage done by a ship," gave the latter courts cognizance in rem over death claims. This is still the law of England.

§ 111. 19 & 10 Vict. c. 93.

² 10 App. Cas. 59.

THE AMERICAN DOCTRINE AS TO SURVIVAL IN ADMIRALTY—INDEPENDENT OF STATUTE.

112. In America there is, independent of statute, no right of action in the admiralty for death injuries.

In the United States the decisions have been far from harmonious. In our dual system of laws, we must consider the question independent of state statute, and also as affected by such statutes.

Some of the district judges, when the question came before them, decided that the common-law doctrine did not govern the admiralty courts; that it was not consonant with natural justice; and that the widow and children had a natural right to damages. Hence they sustained suits by the widow and children, not by the administrator, even in states that had enacted Lord Campbell's act.¹

The question first came before the supreme court in *Ex parte Gordon*,² decided in 1881. A libel had been filed in a district court against a vessel for a death caused by a marine collision. A writ of prohibition was asked to restrain the court from entertaining the case as one beyond its cognizance. The supreme court decided that, as collision was a marine tort, the district court had jurisdiction over the subject-matter; that whether to consider this special claim was a question of the exercise, not of the existence, of jurisdiction; that the lower court could pass upon such a question; and that the proper way to raise it was by appeal. This, therefore, settled nothing.

One branch of the question was presented squarely to the court in the case of *THE HARRISBURG*,³ decided in

§ 112. ¹ *The Sea Gull*, Chase, 145, Fed. Cas. No. 12,578; *The Highland Light*, Chase, 150, Fed. Cas. No. 6,477.

² 104 U. S. 515, 26 L. Ed. 814.

³ 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358.

1886. That was a collision between the schooner *Tilton* and the steamer *Harrisburg*, a Pennsylvania steamer, in Massachusetts waters, in which the mate of the *Tilton*, a citizen of Delaware, was killed. His widow and child libeled the steamer in the United States district court at Philadelphia. Both Massachusetts and Pennsylvania had statutes giving suits to the administrator, but these were held inapplicable, as the libel had not been brought within the time required by those statutes.

Chief Justice Waite reviewed the American decisions, and held that the rule of the common law against the right was well established, and that there was nothing to show that the rule of the admiralty law was different; and he held that, independent of statute, the right of action did not exist, reserving the question whether a statute could give it.

This and the subsequent case of *The Alaska*⁴ settle that the right of action does not exist independent of statute.

Then came the case of *THE CORSAIR*,⁵ decided in 1892. It was a libel in rem against a Louisiana steamer by the parents of a passenger killed by the negligence of the steamer in Louisiana waters. The claim was based upon the sections of the Louisiana Code providing for the bringing of actions for injuries resulting in death. The court held that the statute was evidently not intended to give a remedy in rem, and that, therefore, the court had no jurisdiction of the case. The opinion, however, seems to consider that an action in personam could have been sustained, though this was not necessary to the decision.

This is the last supreme court decision on the subject, and settles nothing as to the power to establish the right of action by statute. This question must now be consid-

⁴ 130 U. S. 201, 9 Sup. Ct. 461, 32 L. Ed. 923.

⁵ 145 U. S. 335, 12 Sup. Ct. 919, 36 L. Ed. 727.

ered in reference, first, to state legislation, and, second, to congressional legislation.

SAME—UNDER STATE STATUTES.

113. A state statute may give a remedy for death injuries, enforceable by proceedings in rem in the admiralty courts, or by ordinary suit in the common-law courts.

The mere fact that a state statute may affect a ship or subjects over which admiralty has jurisdiction does not invalidate it. There are numberless cases where there are concurrent remedies in the state and admiralty courts. Hence there can be no question of the right of a state to give the remedy by common-law action, even for a cause of action maritime by nature. In the case of *American Steamboat Co. v. Chase*,¹ decided in 1872, which was a suit at common law for a death in the waters of Rhode Island caused by a marine collision, the Rhode Island statute giving the right of action at common law was held valid, notwithstanding the point made by defense that the cause of action was maritime by nature, and that the statute was an infringement of the exclusive admiralty jurisdiction of the federal courts. The court forbore to decide whether it was maritime or not, but held that the state could authorize a common-law action in either case.

In the case of *Sherlock v. Alling*,² decided in 1876, an Indiana statute to the same effect was attacked on another ground. It was claimed to violate the commerce clause of the federal constitution, as imposing a new burden on commerce. But the court held that it affected commerce only indirectly, and that in such matters the states could legislate as long as congress failed to legislate on the subject.

§ 113. ¹ 16 Wall. 522, 21 L. Ed. 369.

² 93 U. S. 99, 23 L. Ed. 819.

Hence, as far as this special subject is concerned, it would seem clear that the power of the state to legislate independent of congress is coincident with the power of congress to legislate when it decides to act.

This is, of course, subject to the qualification, explained in a former connection,³ that a state cannot give to its courts an action in rem pure and simple to enforce a maritime cause of action.

The power of a state to legislate in matters of admiralty cognizance has been passed upon so often that its limits are well defined. In the case of *Ex parte McNiel*,⁴ the court says that, though a state statute cannot confer jurisdiction on a federal court, it may give a substantial right, which is enforceable in the proper federal court, whether equity, admiralty, or common law, according to the character of the right given. In other connections the court has frequently decided that, if the subject-matter is maritime, a state statute may annex a right in rem, enforceable in the admiralty court. It may give its courts jurisdiction even of admiralty matters, provided it does not give them an admiralty procedure in rem. Hence a state statute giving a right of action in rem for supplies and repairs on domestic vessels is valid as long as it leaves the power of enforcing the same by pure proceedings in rem to the federal courts.⁵

But a state statute giving a right of action in rem for building a ship does not confer such a power of enforcement on the federal courts, as such a transaction is not maritime by nature, and the states cannot change the nature of an action from nonmaritime to maritime.⁶

For the very reason that it is not maritime they can give a remedy in rem to their own courts to enforce a ship-

³ Ante, p. 99.

⁴ 13 Wall. 236, 20 L. Ed. 624.

⁵ The *Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296.

⁶ *Reach v. Chapman*, 22 How. 129, 16 L. Ed. 291.

building contract, as the power of the states over matters not maritime is not restricted by the constitutional provisions giving the federal courts exclusive cognizance of cases of admiralty and maritime jurisdiction.⁷

Hence, if the subject-matter discussed in this chapter is by nature maritime, the power of a state to give an action in rem enforceable in an admiralty court, in the absence of congressional legislation, seems to follow irresistibly.

SAME—UNDER CONGRESSIONAL STATUTES.

- 114. Congress, under its general power to regulate maritime subjects, can give a right of action in admiralty for death injuries; and a congressional statute would supersede any state statutes in so far as they conflict with it.**

It is now necessary to consider how far congress may legislate on the subject.

Here it must be remembered that the federal courts as a class derive their admiralty jurisdiction direct from the constitution, and not from congressional statutes. How far may federal statutes affect the admiralty jurisdiction? There are many statutes which do affect it,—like the statutes regulating the rules of the road at sea, requiring inspection of steamers, regulating the rights of merchant seamen, etc. It was at one time supposed that similar legislation rested upon the power to regulate commerce, which reasoning, if sound, would have defeated the power of regulating vessels engaged solely in internal commerce. And so it was held as far back as *THE GENESEE CHIEF*,¹ decided in 1851, that congress derives some powers of legislation from the admiralty clause of the constitution, and is not limited to

⁷ *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487.

§ 114. ¹ 12 How. 443, 13 L. Ed. 1058.

the commerce clause. This has been reiterated in many later cases, notably in *EX PARTE GARNETT*,² decided in 1891.

This power of congress to regulate admiralty jurisdiction must now be considered, and defined more accurately. As the grant is by the constitution itself, congress cannot change the general limits or bounds of the admiralty. But within those bounds, as understood by the common consent of enlightened maritime nations, it may regulate procedure, and even rights. It may adopt into our law doctrines of marine law found in other maritime codes, though our admiralty courts had never before administered such a doctrine. It cannot make that marine which is not marine by nature, but, if it is marine by nature, and so recognized in maritime circles, congress may give it a place in our admiralty law which it had never had before. To illustrate, congress could pass a statute regulating the manner in which approaching vessels should act to prevent collision, even though both were enrolled in Virginia, and never left the boundaries of Virginia; but congress could hardly pass a statute regulating the precautions which approaching railroad trains should take to avoid collision, and relegate their enforcement to the admiralty courts.

This subject has been very thoroughly considered by the supreme court in connection with the statute limiting the liability of a vessel owner for torts of his ship or crew to the value of the ship. This act was passed on March 3, 1851. In the case of *Norwich & N. Y. Transp. Co. v. Wright*,³ it is said to have originated in the maritime law of modern Europe. In the case of *THE SCOTLAND*,⁴ the court, repeating what it had said in *THE LOTTA-WANNA*,⁵ says that the foreign maritime codes and com-

² 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.

³ 13 Wall. 104, 20 L. Ed. 585.

⁴ 105 U. S. 24, 26 L. Ed. 1001.

⁵ 21 Wall. 558, 22 L. Ed. 654.

pilations were operative in any country only so far as that country chose to adopt them, and not as authority per se; but that congress could adopt such a principle into our law from the general body of maritime law. In the case of *EX PARTE PHENIX INS. CO.*,⁶ an application was made for the benefit of this limitation against a fire on land started by a passing steamer. The court held, however, that the limitation was only intended to protect against such causes of action as the district court could have heard on libel in rem or in personam, and a loss consummate on land was not one of these. In other words, this case settled that the limitation could only be pleaded against such causes of action as were in their nature maritime, no matter in what forum, state or federal, they were asserted.

Then came the case of *BUTLER v. BOSTON & S. S. S. CO.*⁷ There the act was invoked as a protection against a suit on account of the death of a passenger on Massachusetts waters, brought in a Massachusetts court under a Massachusetts statute. If this cause of action was not maritime by nature, and the Massachusetts act could not have given a remedy enforceable in the admiralty, it would have been the duty of the court, under the principles of *EX PARTE PHENIX INS. CO.*, to have refused the benefit of the limited liability act against the suit as one of which a district court would not have had original jurisdiction in admiralty. But the court decided that congress had power to adopt the act from the Continental maritime codes, and to extend its protection to death cases, and that this power came from the admiralty and maritime clause of the constitution, not from the commerce clause.⁸

This would seem to settle the question that such a cause of action is maritime by nature, even if it were not clear

⁶ 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274.

⁷ 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017.

⁸ See, also, *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751.

enough already. In the first part of this chapter it has been shown that the leading Continental maritime nations recognized such a right of action. If congress can ingraft on our maritime law their limited liability act, it can, on the same principle, borrow their action for death injuries.

If this reasoning and the above authorities establish that such a cause of action is maritime, two results follow:

(1) A state statute can be made to regulate the right, and can give it in personam or in rem, enforceable in the admiralty, or by an ordinary personal action in its own courts.

(2) An act of congress may also regulate the subject, and in such case it would supersede the state statute, at least so far as foreign vessels are concerned, or as far as it would regulate the remedy in admiralty.

In the concluding paragraph of the opinion in *BUTLER v. BOSTON & S. S. S. CO.*, supra, the court reserves the question whether a state statute can have this effect. This was probably a mere cautious reservation of a question not directly involved, but the conclusion would seem to follow irresistibly from the above authorities.

THE LAW GOVERNING.

115. The right of action is governed by the law of the place where it arose, or by the law of the flag if it arose on the high seas.

It is an important question what law governs in such cases. A state statute would regulate any such occurrence on the waters within its jurisdiction, and any negligent killing on the high seas of any one on a vessel would be governed by the laws of the vessel's hailing port. This has been expressly decided in *New York*¹ on grounds that seem

§ 115. ¹ *McDonald v. Mallory*, 77 N. Y. 546, 43 Am. Rep. 664.

conclusive, though a contrary conclusion was reached by Judge Sawyer in *Armstrong v. Beadle*.²

It is a favorite principle of admiralty that its rights of action follow a ship around the world, and may be enforced in any port. This is true as to personal injuries, and in such cases the court enforces the law of the place where the cause of action arose, or the law of the flag if it arose on the high seas, and if shown what that law is.³

EFFECT OF CONTRIBUTORY NEGLIGENCE.

116. Contributory negligence bars recovery.

There is one anomaly in the decisions on the subject. Although the doctrine finds its place in the admiralty law only from the fact that it is maritime by nature, it is held that, even in the admiralty courts in suits for such causes of action contributory negligence bars recovery.¹

Admiralty courts have their own doctrine on the subject of contributory negligence. In collision cases, where both are negligent, the damages are equally divided.

In personal injury cases, not fatal, the damages are divided, not equally, but much as the judge may think equitable, considering the circumstances and the relative fault of the parties.²

In other words, in all other admiralty cases contributory negligence reduces recovery, but does not defeat it. But in this case the rigid doctrine of the common law as to contributory negligence is applied.

² 5 Sawy. 484, Fed. Cas. No. 541.

³ *The Lamington* (D. C.) 87 Fed. 752; *Panama R. Co. v. Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004.

§ 116. ¹ *Robinson v. Navigation Co.*, 20 C. C. A. 86, 73 Fed. 883.

² *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586, and cases cited.

CONSTRUCTION OF PARTICULAR STATUTES.

117. Assuming the power of legislation over the subject, state or federal, as defined in the above discussion, the question whether any given statute gives a remedy in rem is a mere matter of construction.

Statutes worded substantially as Lord Campbell's act are usually construed as not so intended. It has been seen that the house of lords so construed it in *THE VERA CRUZ*,¹ and that the supreme court so construed the Louisiana statute in *THE CORSAIR*.² Judge Benedict placed a similar construction on the New York statute in *The Sylvan Glen*.³ And Judge Hughes so construed the Virginia statute in *The Manhasset*.⁴ Since that decision the Virginia statute has been amended, and the circuit court of appeals for this circuit has held that in its present form, as found in section 2902 of the Virginia Code of 1887, it gives the right of procedure in rem.⁵

The decisions or dicta on the general subject have been numerous. In view of its importance, many are collected in a footnote.⁶

§ 117. ¹ 10 App. Cas. 59.

² 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.

³ (D. C.) 9 Fed. 335.

⁴ (D. C.) 18 Fed. 918.

⁵ *The Glendale* (D. C.) 77 Fed. 906; *Id.*, 26 C. C. A. 500, 81 Fed. 633.

⁶ *Plummer v. Webb*, 1 Ware, 69, Fed. Cas. No. 11,234; *Cutting v. Seabury*, 1 Spr. 522, Fed. Cas. No. 3,521; *The Sea Gull*, Chase, 145, Fed. Cas. No. 12,578; *The Highland Light*, Chase, 150, Fed. Cas. No. 6,477; *The Charles Morgan*, 2 Flip. 274, Fed. Cas. No. 2,618; *The Towanda*, Fed. Cas. No. 14,109; *Armstrong v. Beadle*, 5 Sawy. 484, Fed. Cas. No. 541; *The David Reeves*, 5 Hughes, 89, Fed. Cas. No. 6,625; *The Epsilon*, 6 Ben. 378, Fed. Cas. No. 4,506; *Holmes v. Railroad Co.* (D. C.) 5 Fed. 75; *In re Long Island N. S. Passenger &*

Freight Transp. Co. (D. C.) 5 Fed. 599; *The Garland* (D. C.) 5 Fed. 924; *The E. B. Ward, Jr.* (C. C.) 16 Fed. 255, 17 Fed. 456, 23 Fed. 900; *The Columbia* (D. C.) 27 Fed. 704; *The Cephalonia* (D. C.) 29 Fed. 332; *Id.* (C. C.) 32 Fed. 112; *The Ida Cambell* (D. C.) 34 Fed. 432; *The Wydale* (D. C.) 37 Fed. 716; *The A. W. Thompson* (D. C.) 39 Fed. 115; *The North Cambria* (D. C.) 39 Fed. 615, 40 Fed. 655; *The Oregon* (D. C.) 42 Fed. 78, 45 Fed. 62; *The St. Nicholas* (D. C.) 49 Fed. 671; *The City of Norwalk* (D. C.) 55 Fed. 98; *The Transfer No. 4*, 9 C. C. A. 521, 61 Fed. 364; *The Premier* (D. C.) 59 Fed. 797; *The Willamette*, 18 C. C. A. 366, 70 Fed. 874, 31 L. R. A. 715; *In re Humboldt Lumber Mfrs. Ass'n* (D. C.) 60 Fed. 428; *Id.*, 19 C. C. A. 481, 73 Fed. 239, 46 L. R. A. 264; *The Oregon* (D. C.) 73 Fed. 846; *Laidlaw v. Navigation Co.*, 26 C. C. A. 665, 81 Fed. 876; *Brannigan v. Mining Co.* (C. C.) 93 Fed. 164; *Rundell v. La Compagnie Generale Transatlantique* (D. C.) 94 Fed. 366; *Id.*, 40 C. C. A. 625, 100 Fed. 655, 49 L. R. A. 92; *The Jane Gray* (D. C.) 95 Fed. 693; *Adams v. Railroad Co.* (C. C.) 95 Fed. 938; *The Onoko* (D. C.) 100 Fed. 477; *Id.* (C. C. A.) 107 Fed. 984; *Vetaloro v. Perkins* (C. C.) 101 Fed. 393.

CHAPTER XI.

OF TORTS TO THE PROPERTY, AND HEREIN OF COLLISION.

- 118. Rules for Preventing Collisions, the Different Systems, and the Localities where They Apply.
- 119. Preliminary Definitions.
- 120. Distinctive Lights Prescribed for Different Vessels.
- 121. Sound Signals in Obscured Weather.
- 122. Speed in Obscured Weather.
- 123. Precautions when Approaching Fog Bank.
- 124. Steering and Sailing Rules in Fog.

RULES FOR PREVENTING COLLISIONS, THE DIFFERENT SYSTEMS, AND THE LOCALITIES WHERE THEY APPLY.

- 118. There are four different sets of navigation rules which American courts may have to administer, namely, the International Rules, the Inland Rules for Coast Waters, the Lake Rules, and the Mississippi Valley Rules.

The torts by far most prolific of litigation in the admiralty are collisions between approaching vessels. To that cause is due the loss of many lives, with untold valuable property. Until the present century had more than half elapsed, there were no rules regulating the duties of approaching vessels, and navigation was a happy-go-lucky experiment, in which the unfortunate seafaring man was at the mercy not only of his own captain, but of the commanders of approaching vessels as well.

The earlier statutes contented themselves with requiring vessels to carry lights at night, for until 1838, even in this country, that was not a matter obligatory, though the courts had attempted to take the matter in hand by holding that in

case of collision between a dark vessel and a lighted vessel they would hold the dark vessel in fault.¹

In England, though special statutes had prescribed rules for special cases, no code of rules intended to regulate the navigation of vessels in relation to each other was promulgated until the statute of 25 & 26 Vict. put in force as of June 1, 1863, the regulations prescribed by the orders in council. These were intended to prescribe not only the lights which vessels must carry at night, but all possible contingencies, including their duties in a fog, the relative duties of steamer to steamer, sail to sail, and steamer to sail. They were enacted in substantially the same form by congress on April 29, 1864, and now constitute section 4233, Rev. St. U. S.

These rules, however, though regulating lights, and the proper methods of steering and sailing, prescribed no signals except during fog. This defect in our country was remedied by the board of supervising inspectors, who, by virtue of authority conferred on them by section 4412, Rev. St. (to establish regulations to be observed by steam vessels in passing each other, copies of such regulations to be posted in conspicuous places on such steamers), provided signals by whistle, which enabled masters of approaching vessels to indicate to each other their exact intentions. These rules governed all vessels in American waters,—even foreign vessels.² Though admirable in their general scope, they were yet far from perfect, and the next advance was the enactment of the International Rules of 1885. They went into force in this country on March 3, 1885, but they were expressly limited to the high seas and coast waters. And so we had two sets of rules in force,—the rules of 1864, embodied in section 4233, Rev. St., supplemented by the Supervising Inspectors' Rules, all applying only to inland waters, and the

§ 118. ¹ *The Osprey*, 1 Spr. 245, Fed. Cas. No. 10,606.

² *The Sarmatian* (C. C.) 2 Fed. 911.

International Rules of 1885, applying to the high seas and coast waters.

In the case of *THE DELAWARE*,³ the supreme court decided that the line between the two was the place of taking a local pilot; that everything on regular pilotage ground was inland, and everything outside was high seas or coast waters. In 1889 representatives from the leading maritime nations met in Washington by invitation of our government, still further elaborated the code of navigation, and recommended to their respective principals to adopt the result of their deliberations. On August 19, 1890, congress enacted it into law, to go into effect, however, at a time to be fixed by presidential proclamation.

In some particulars these rules were unsatisfactory, and they remained in a state of suspended animation till July 1, 1897.

They were further amended by act of May 28, 1894,⁴ and act of June 10, 1896,⁵ and on December 31, 1896,⁶ the proclamation of the president formally put them in force as of July 1, 1897.

These rules purported to apply to "the high seas and all waters connected therewith navigable by seagoing vessels." But its thirtieth article provided that nothing in them should interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters.

By act of February 19, 1895,⁷ congress, acting under this saving clause, kept in force the rules found in section 4233, Rev. St., and the Inspectors' Rules supplementing them, for harbors, rivers, and inland waters (not including the Great Lakes and their tributaries), declared them rules made by

³ 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

⁴ 28 Stat. 82.

⁵ 29 Stat. 381.

⁶ 29 Stat. 885.

⁷ 28 Stat. 672.

local authority, and directed the secretary of the treasury to define the lines between such waters and the high seas, which was done. But by the act of June 7, 1897,⁸ congress codified the inland rules also, making them apply on all harbors, rivers, and inland waters, except the Great Lakes, the Red River of the North, and the waters emptying into the Gulf of Mexico. This act repealed sections 1 and 3 of the act of February 19, 1895, but left section 2 of that act (by which the secretary of the treasury was directed to define the lines between the high seas and inland waters) still in force. These rules went into effect on October 1, 1897. Both these rules and the International Rules were slightly amended by the act of February 19, 1900,⁹ prescribing the lights required of steam pilot vessels.

Navigation on the Great Lakes is regulated by the act of February 8, 1895,¹⁰ which applies to the Great Lakes and their connecting and tributary waters as far east as Montreal.

Navigation on the Mississippi river as far down as New Orleans, also on its tributaries and on the Red River of the North, is governed still by the old rules found in section 4233, Rev. St., and amendments and the pilot rules for western rivers supplementing them.

Hence the courts may be required to administer any one of four sets of rules :

- (1) The International Rules for collisions on the high seas.
- (2) The Inland Rules for collisions on coast waters or waters connecting therewith, inside of the dividing lines fixed by the secretary of the treasury.
- (3) The Lake Rules for the Great Lakes and their adjacent streams.
- (4) The Mississippi Valley Rules.

And, besides all these, the courts have held that vessels navigating any given waters are bound to observe rules

⁸ 30 Stat. 96.

⁹ 31 Stat. 30.

¹⁰ 28 Stat. 645.

made by municipal or state authority for that locality. For instance, a New York statute requiring boats navigating the East river to keep in mid-stream, away from the docks, so as to allow unimpeded ingress to them, has been held obligatory on vessels.¹¹

Many ports abroad have their local rules, and these are enforced by the courts.¹²

Even local customs not emanating from legislative authority are binding.¹³

Though there are striking differences between these four sets of rules, their general scheme is the same, and therefore the International Rules will be made the basis in this discussion, though attention will be directed to some of the more important differences. It will be found that they constitute a common language of the sea, by which approaching navigators, no matter what their nationality, may speak to each other in tones understood of all seafaring men. Under them, if followed, collisions need never occur, unless by some negligence or inattention which no rules can prevent; for in this, as in the other affairs of life, the personal equation cannot be completely eliminated.

PRELIMINARY DEFINITIONS.

119. The first aim of the rules is to classify, for the purpose of the regulations, steam vessels and sailing vessels and vessels under way, etc.

The relative duties of steam and sail vessels and of vessels under way and vessels at anchor are so different (as will ap-

¹¹ The *Ivanhoe*, 7 Ben. 213, Fed. Cas. No. 7,113; The *Bay State*, 3 Blatchf. 48, Fed. Cas. No. 1,149; The *Favorita*, 18 Wall. 598, 21 L. Ed. 856.

¹² The *Margaret*, 9 App. Cas. 873; The *Spearman*, 10 App. Cas. 276.

¹³ The *Fyenoord*, Swab. 374; THE VICTORY, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519.

pear hereafter) that the first effort of the rules is to distinguish these cases closely. Accordingly, in the preliminary definition, every vessel under sail, even though by build a steamer, is treated as a sail vessel, and every vessel under steam or propelled by machinery is considered a steam vessel. This latter definition would include electric or naphtha launches, which, indeed, as far as the local rules are concerned, are brought into the category of steam vessels by express act of congress.¹ On the other hand, a broken-down steamer, slowly finding her way into port under sail, is, as to other vessels, considered a sail vessel.

So, too, in order to avoid any possible misunderstanding, a vessel, even though her headway is killed in the water, is considered under way, unless she is at anchor, or tied to the shore, or aground. The reason is that, unless she is thus fastened to something, a turn of her engines may put her under way, and therefore she should be avoided.

DISTINCTIVE LIGHTS PRESCRIBED FOR DIFFERENT VESSELS.

120. The next aim of the rules is to indicate to other vessels the character and course and bearing of a neighboring vessel, and whether she is in motion. This is done by the use of distinctive lights, white and colored, in various combinations, for unincumbered steamers, incumbered steamers, sailing vessels, etc.

The first thirteen articles regulate the all-important subject of vessels' lights.

After defining the word "visible" as meaning visible on a dark night with a clear atmosphere, it is provided that the lights prescribed shall be shown from sunset to sunrise, and

§ 119. 1 29 Stat. 489.

that no others which could be mistaken for them shall be shown. This requirement, however, does not exempt a vessel from taking proper measures to avoid another without the lights if she can be seen, as is frequently the case just after sunset, or on a clear moonlight night, but it casts on the offending vessel the burden of showing that her offense not only did not, but could not possibly, have contributed to the accident.¹

The first effort is to adopt distinctive lights for different classes of vessels, so that steamers unincumbered or with tows, sail vessels, small craft, and special kinds of vessels, like pilot boats and fishing vessels, can announce their character at a glance. This is accomplished by the use of white lights, colored lights, and flare-up lights in various combinations. The colored lights are carried on the sides of the vessel, the white lights near amidships, and at an elevation.

(1) *Unincumbered Steamers (article 2).*

An unincumbered steamer under way carries a white light well forward, at least twenty feet above the hull, strong enough to show five miles, but with a board behind it, so arranged that it cannot be seen from behind. In the language of the rule, it shows twenty points. As there are thirty-two points in all, this makes it show two points abaft the beam on each side; so that overtaking vessels cannot see this special light unless they are nearly up to a point abeam. This is called the "masthead light," and is the white light usually carried by seagoing vessels. This light, in the Inland Rules, need not be twenty feet above the hull.

Steamers, however, instead of carrying this single white light, are allowed the option of substituting two white lights. In this case an additional white light is placed aft amidships,

§ 120. ¹ *The Kirkland*, 5 Hughes, 109, 48 Fed. 760; *The Tillie*, 13 Blatchf. 514, Fed. Cas. No. 14,049; *THE PENNSYLVANIA*, 19 Wall. 125, 22 L. Ed. 148.

at least fifteen feet higher than the bow light. This is usually called the "flagstaff light," and differs from the other in having no screen, and therefore in showing all around the horizon. These two lights possess the important advantage of giving a range, and thus announcing the exact direction in which their bearer is moving. This is not important at sea, where there is plenty of room; but it is important in narrow, crowded, or devious channels, and hence the river and bay steamers usually adopt this plan. In the Lake Rules this is obligatory on steamers over 150 feet register length.

The colored lights prescribed for steamers are: On the starboard or right-hand side, a green light strong enough to be visible at least two miles, and fitted with screens, so arranged that it will not show backwards till an approaching vessel is within two points of abeam, and that it will not show across the ship; in other words, it must only show from right ahead to two points abaft the beam. On the port or left-hand side there is a red light screened in the same way. Thus a vessel moving right ahead in exactly the opposite direction would see both colored lights (or side lights as they are usually called) and the masthead light, or the two range lights in line, would know that she was meeting a steamer, and would govern herself accordingly.

In the Mississippi Valley Rules, steamers carry simply the colored lights, attaching them to their respective smokestacks, and arranging them to show only forward and abeam.²

(2) *Steamers with Tows (article 3).*

Let us now suppose that our steamer takes another vessel in tow. How does she announce the fact to her marine neighbors? She accomplishes it by additional white lights. If she uses the masthead light, she hangs another one six

² See Pilot Rule No. 10 for Western Rivers.

feet under it, and screened just like it, and still another if her tow consists of more than one vessel, and is over 600 feet long.

Here there is a slight difference between the International Rules and the Local Rules. Under the latter she puts the additional light or lights under the after-range light, three feet apart, and uses for the purpose lights which, like it, show all around the horizon. Tugs in harbor work almost invariably use this latter rig.

The Lake Rules require only one towing light, no matter how long the tow, and a special light if the tow is a raft.

The Mississippi Valley Rules (where unincumbered river steamers have no white lights) require two vertical towing lights forward, arranged to show an arc like the masthead lights.

Hence an approaching vessel, seeing these "towing" or "vertical" lights, as they are usually called, knows that it is meeting a steamer with a tow, and must regulate its navigation not only in reference to the tug, but the other vessel behind it.

(3) *Special Lights (article 5).*

Vessels not under command carry two vertical red lights at night, showing all around the horizon, or two black balls by day; and vessels laying telegraph cables have peculiar lights, warning other vessels of their mission. The Inland Rules, Lake Rules, and Mississippi Valley Rules have no corresponding lights or balls.

(4) *Sail Vessels and Vessels Towed (article 5).*

These carry the two colored or side lights prescribed for steamers, and no others. Hence a mariner seeing only a colored light or lights on a vessel knows that it is a sail vessel, or a vessel towed. If, at a second glance, he sees no steamer in front showing the tow lights just described, he knows it is a sail vessel.

(5) *Small Vessels (article 6).*

These can carry movable colored lights and show them to an approaching vessel. The International Rules and the Lake Rules do not define what is meant by a small vessel; the corresponding inland rule defines it as a vessel of less than ten gross tons.

(6) *Small Steam and Sail Vessels and Open Boats (article 7).*

Steam vessels under 40 tons and sail vessels or oar vessels under 20 tons gross may elect a different rig under the international rule. The steamers may have a small white light forward and a combined lantern, showing red and green on the proper sides, behind the white light, and below it; the sail or oar vessel may have a similar combination green and white light, to be exhibited on the approach of another vessel; and rowboats may have a white lantern to be shown when needed. The corresponding inland rule omits this provision except for rowboats. The Lake Rules permit a combined lantern on open boats, and the Mississippi Valley Rules permit it on boats under ten tons propelled by gas, fluid, naphtha, or electric motors.

(7) *Pilot Vessels (article 8).*

These show a white light at the masthead, visible all around, and a flare-up light every fifteen minutes, to attract attention. When not on their station, they exhibit the ordinary lights. If it is a steam pilot boat on its station, it must, by the act of February 19, 1900,³ amending the International Rules and Inland Rules, show a red light immediately under the masthead light, and visible all around, with the colored side lights if not at anchor, and without them if at anchor.

(8) *Fishing Vessels (article 9).*

The International Rule on this class is not of interest. The corresponding Inland Rule provides, in substance, that

³ 31 Stat. 30.

when not fishing they carry the ordinary lights, and when fishing they use a special rig.

The International Rules make no provision for a large class of craft common in American waters, such as rafts, mud scows, etc. The Inland Rules leave this to the supervising inspectors. By act of March 3, 1893,⁴ this power had been expressly conferred on the supervising inspectors as far as barges and canal boats were concerned. Accordingly, at their session in 1894, they provided a multitude of rules for such boats towing tandem, or in tiers, or alongside, which it is hardly worth while to explain in detail. The mud scows so common around dredging machinery in our harbors are required to carry a white light at each end, not less than six feet above the deck. The Inland Rules and Lake Rules also empowered the supervising inspectors to make similar regulations.

(9) *Overtaken Vessels (article 10).*

It is obvious from the preceding explanations that a steamer rigged with the masthead light instead of the range white lights and a sail vessel or vessels in tow cannot be seen from behind, as all their lights are screened so as to show only forward. Hence this rule provides that the vessel being overtaken shall show from astern a white light or a flare-up light. They may fix this light permanently, or merely hold it there sufficiently long to give the approaching vessel ample notice; but, if fixed, it must be about on a level with the side lights, and so screened as to show right back over an arc of twelve points, or 135 degrees.

The Lake Rules (No. 12) and the Mississippi Valley Rules require sail vessels, on the approach of any steamer during the night time, to show a lighted torch upon the point or quarter to which such steamer shall be approaching.

The language of this rule is broad enough to include a steamer approaching from any direction, whether the sail

is at anchor or not. And, accordingly, there were several decisions of the inferior courts holding that the torch must be exhibited under all circumstances.⁵

But in *THE OREGON*,⁶ the supreme court held that the provision was intended to supply an obvious defect in the old rules in requiring no light shown to overtaking vessels, that this was its primary object, and that it did not apply to anchored vessels. If the side lights are good, it would probably not be necessary to show it to steamers approaching any point forward of the beam, though there are district court decisions requiring it.

In any event, the International and Inland Rules require it to be shown only to overtaking vessels,⁷ except as an extra precaution under article 12.⁸

(10) *Anchor Lights (article 11).*

This is a very important light in roadsteads and harbors. It is a white light, placed in the rigging so as to be visible all around the horizon for a distance of at least one mile. Vessels under 150 feet long must not carry it over 20 feet above the hull; vessels over that length carry it from 20 to 40 feet above the hull. If the vessel is over 150 feet long, then there must be an extra light astern. It need not necessarily be forward of the foremast, but may be in the fore-rigging, if the view is unobstructed all around.⁹ A vessel must show her anchor light if in navigable water, even though outside the channel as marked by the buoys.¹⁰

⁵ *The Lizzie Henderson* (D. C.) 20 Fed. 524; *The Algiers* (O. C.) 28 Fed. 240.

⁶ 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.

⁷ *The Algiers* (D. C.) 38 Fed. 526.

⁸ *The Excelsior* (D. C.) 102 Fed. 652; *The Robert Graham Dun* (C. C. A.) 107 Fed. 994.

⁹ *The Philadelphian* [1900] Prob. Div. 262.

¹⁰ *The Oliver* (D. C.) 22 Fed. 848.

SOUND SIGNALS IN OBSCURED WEATHER.

121. Distinctive sound signals are prescribed for different vessels as precautions in obscured weather, to be used when the obscuration is such that signals can be heard further than lights can be seen.

The Signals Required.

Article 15 regulates these signals in case of fog. Steamers navigating as such give them on their whistle or siren. Sail vessels in motion, or vessels being towed, give them on a fog horn.

For a long time the horn used on sail vessels was an ordinary tin horn, blown by the breath. But this was too fatiguing to be diligently attended to, and so since the rules of 1885 it has been required to be sounded by "mechanical means." Those now in use are a box containing a bellows worked by a crank. The blast that they give is sufficient to be heard a long distance. So particular are the courts to require its use that, if a mouth horn is used, and a collision occurs, the court will require the offending vessel to show not only that this negligence might not have contributed to the collision, but could not possibly have done so.¹

The Lake Rules merely require for sailing vessels an "efficient fog horn," and do not require it to be sounded "by mechanical means."

By the International Rules unincumbered steamers in motion sound one blast every two minutes, by the Inland and Mississippi Valley Rules they sound one blast every minute, and by the Lake Rules three blasts every minute.

By the International, Inland, and Lake Rules sail vessels blow their horns, according to the bearing of the wind, one

§ 121. ¹ THE MARTELLLO, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; The Hercules, 26 C. C. A. 301, 80 Fed. 998.

blast for the starboard tack, two for the port, and three for the wind abaft the beam.

The Weather in Which Signals Required.

As to the weather in which those signals should be given, the first law required it to be given in "fog or thick weather." Accordingly, under those rules, it was held that they need not be given in snow storms.²

The International Rules of 1885 extended the requirements of signaling to "fog, mist, or falling snow"; and the present rules extend it to "fog, mist, falling snow, or heavy rain storms," showing a constantly increasing vigilance. The Lake Rules are equally rigid.

It is not easy to define what constitutes fog or mist. A mere haze in the atmosphere could hardly come under the term. Perhaps the best definition of this is given in *THE MONTICELLO*,³ in which Judge Lowell says: "What is a fog, such as the statute intends? Is it every haze, by day or night, of whatever density? To give the statute a reasonable interpretation, we must suppose that its intent is to give to approaching vessels a warning which the fog would otherwise deprive them of. By day there must be fog enough to shut out the view of the sails or hull, or by night of the lights, within the range of the horn, whistle, or bell. It means that a safeguard of practical utility under the circumstances should be provided. If it be entirely plain, under the evidence, that the ordinary signals are sufficient, and more efficacious than the horn could be, the horn will not be required. But a serious doubt upon the point must weigh against the vessel failing to comply with the statute. I do not consider it to be enough to aver and prove that the lights might be seen in time to avoid serious danger; but, where it is evident that the fog signal could not have been so useful as the ordinary signal, it need not be used.

² *The Rockaway* (C. C.) 25 Fed. 775.

³ *THE MONTICELLO*, 1 Low. 184, Fed. Cas. No. 9,739.

Thus, if the lights could be plainly and easily made out a mile, and the fog horn could not be heard at a third or a quarter of that distance, I cannot suppose that such a state of the atmosphere would amount to a fog in the sense of the law. It is to guard against some danger which the fog would or might cause, and from which the horn might possibly guard, that it is to be blown."

This, in substance, means that, if the weather is such that the whistles can be heard further than the lights can be seen, the signals should be given. As modern whistles are very powerful, and the side lights are required to show two miles, the logical deduction from this is that, if the mariners cannot see two miles, they should give the additional warning of the signals. In practice this is not done. And yet, when we consider that two vessels, each moving fifteen miles an hour (not a fast rate for modern steamers), are, when two miles apart in distance, only four minutes apart in time, we see that but little time is left for reflection. The distance at which vessels give the passing signals (explained later on) is usually taken as half a mile. At this distance, if each is moving fifteen miles an hour, they are only a minute apart in time.

Vessels at anchor ring every minute (every two minutes by the Lake Rules) a bell for five seconds. Towing vessels, and vessels under way, though not under command, give every two minutes a signal of one long blast, followed by two short ones. It is optional with vessels in tow whether to give this signal or not, but they shall not give any other. Small sailing vessels or boats may give these or not, but must make some good noise.

By the Lake Rules towing steamers give the same signals as free steamers, and the tow must also give signals with her bell. And steamers with rafts give frequent screech or Modoc whistles.

SPEED IN OBSCURED WEATHER.

122. In obscured weather vessels must go at a moderate speed, taking all circumstances into consideration.

Article 16 lays down the vital and essential rule for fogs. It provides that every vessel shall go at a moderate speed, having careful regard to the existing circumstances and conditions. This term "moderate speed" is very elastic in its meaning, and has been the subject of much judicial discussion. It varies to some extent with the character of the vessel, and to a very great extent with the character of the locality. A speed that is moderate on the high seas out of the usual track of navigation would be highly dangerous in harbors or their approaches. A moderate speed for a steamer would be an immoderate one for a sail vessel. A speed that is moderate when you can see a mile would be excessive when you can see a hundred yards.

It would be impossible to review even a small part of the decisions on this subject. We must content ourselves with elucidating a few general principles.

Requirement of Moderate Speed Applies Alike to Sail and Steam Vessels.

The requirement applies as well to sail vessels as to steamers. In a fog they must not only give their signals properly, but they must shorten sail until their speed is just sufficient for steerage way. As they have no means of stopping and backing, like steamers, it is the more incumbent on them to obey this rule.

In *The George Bell*,¹ which was a collision on the Banks, the fog was such that they could see for 300 yards. The court held that a speed of five miles an hour was too fast,

§ 122. ¹ 3 Hughes, 468, Fed. Cas. No. 5,856.

due to the fact that the ship was carrying its mainsail and mizzensail.

In the well-considered English case of *THE ZADOK*,² a sailing vessel was held at fault which was carrying practically all her canvas; and the true criterion was announced to be the ability to steer.

"It is the duty of the ship, whether she be a sailing vessel or a steamer, to moderate her speed as much as she can, yet leaving herself with the capacity of being properly steered."

Steamers must Go so Slow as to be Able to Stop on Seeing Other Vessel.

The rule requires the speed of steamers to be such that they can stop on seeing the approaching vessel, assuming her also to be going at a moderate speed. This seems to be the result of the recent decision of *THE UMBRIA*,³ which reviews the question of fog speed and fog maneuvers at length. Despite the high authority of the court, and the special respect which marine lawyers pay to the opinions of Mr. Justice Brown, this does not seem to be a satisfactory or practical test. In the first place, it makes us measure a man's conduct by the motions of the other vessel, which he could not have known at the time; and we are, therefore, trying him on facts developed long afterwards in the court room, and not on the facts as they appeared to him.

In the next place, the fog may be so thick that one can hardly see the stem of his own vessel, much less an approaching vessel, even though only a few yards off. Hence the rule, carried to its logical consequences, would require the vessel to anchor, and then, as Mr. Justice Clifford says in *The Colorado*,⁴ she is in danger from vessels astern.

In the next place, it is a very uncertain test. Different

² 9 Prob. Div., at page 116.

³ 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053.

⁴ 91 U. S. 692, 23 L. Ed. 379.

steamers can stop in different distances, depending on the power of their engines. Hence this test implies that the navigator must know the handiness of the other steamer as well as his own.

There is another rule, much simpler, dependent on knowledge of his own vessel only, and in its practical results much safer. It is laid down in *THE ZADOK CASE*, above cited, and in many supreme court cases before *THE UMBRIA*. It cannot be better expressed than to quote Justice Clifford's opinion in *The Colorado*:⁵ "Very slow speed, just sufficient to subject the vessel to the command of her helm." In *THE MARTELLO*,⁶ the supreme court says that the vessel must "reduce her speed to the lowest possible point consistent with good steerageway."

As samples of what speed the courts consider immoderate, we might cite *THE PENNSYLVANIA*,⁷ where a speed in a steamer of seven miles an hour at a point two hundred miles out at sea, but in the track of navigation, was condemned; and *THE MARTELLO*,⁸ where a speed of six miles an hour in the lower harbor of New York was thought too fast.

PRECAUTIONS WHEN APPROACHING FOG BANK.

123. Vessels approaching fog banks are bound to use the precautions of sound signals and moderate speed.

As the object of fog signals and slow speed is the protection of other vessels, the law requires a vessel to take these precautions as she approaches a fog bank, and even before

⁵ *Id.*

⁶ 153 U. S., at page 70, 14 Sup. Ct. 723, 38 L. Ed. 637.

⁷ 19 Wall. 125, 22 L. Ed. 148.

⁸ 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637.

she enters it, for she cannot know what is in the bank ahead of her.¹

The laws of acoustics are so little understood, and the failure to hear signals in fog so inexplicable, that such failure is not negligence under the decision.²

STEERING AND SAILING RULES IN FOG.

124. Steering and sailing rules do not apply in fog.

In a fog, when vessels cannot see each other, the ordinary steering and sailing rules do not apply, for they presuppose a knowledge of the other vessel's character, bearing, and course, which cannot be known in fog.

"But it is urged that the *Negaunee*, being on the port tack, was, under the seventeenth rule of section 4233, Rev. St., required to keep out of the way of the *Portch*; that the *Portch* had the right of way, and was to hold her course, and it was the *Negaunee's* duty to give the way or turn out; and this rule would be aptly invoked if the proof showed that those in charge of the *Negaunee* had sufficient notice of the proximity of the *Portch* to enable them to execute the proper movements to give the *Portch* the way. The proof, however, shows, as I have already said, that at the time the *Negaunee's* officers were apprised of the presence of the *Portch* they were so near together, and a collision so imminent, that it was futile to attempt to keep out of the way; and it seems to me that, under the circumstances, rule seventeen was inoperative, and rule twenty-four of the same section, which required that due regard must be had to all the dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from the general rules necessary in order to avoid immediate

§ 123. ¹ *The Milanese*, 4 Asp. 438; *The Perklomen* (D. C.) 27 Fed. 573; *The Trave* (D. C.) 55 Fed. 117.

² *Spencer*, Marine Coll. 138, 139.

danger, became the guide of both parties; that is, that each party, under an unexpected impending peril, must do what he can promptly to avoid it.”¹

“But when you speak of rules which are to regulate the conduct of people, those rules can only be applied to circumstances which must or ought to be known to the parties at the time. You cannot regulate the conduct of people as to unknown circumstances. When you instruct people, you instruct them as to what they ought to do under circumstances which are, or ought to be, before them. When you say that a man must stop and reverse, or, I will say, slacken his speed, in order to prevent risk of collision, it would be absurd to suppose that it would depend upon the mere fact of whether there was risk of collision, if the circumstances were such that he could not know there was risk of collision. I put some instances during the argument to show that that was so. The rule says that a steamer approaching another vessel ought to slacken her speed if, by going on, there would be risk of collision. But, suppose the night were quite dark, and the other ship was showing no light at all, it would be wrong to say, with regard to the conduct of those on the steamer, that when they have not the means of knowing, and could not possibly know, that there was another ship in their way, or near, they ought to see that the other ship was in the way or approaching, and that it is no excuse that they did not see them. Take another case: If two vessels are approaching, each on a different course, which will cause them to meet on a high headland, so that, until they are absolutely close, they cannot see each other, it is quite obvious that, if both are steamers, they ought, on the suggested reading of the rule, to stop and reverse. But how can you regulate their conduct if neither can see the other until they are close together? It is absurd to suppose that you could regulate their conduct, not with regard

§ 124. ¹ The Negaunee (D. C.) 20 Fed. 921.

to what they can see, but to what they cannot see. Therefore the consideration must always be, in these cases, not whether the rule was in fact applicable, but were the circumstances such as that it ought to have been present in the mind of the person in charge that it was applicable?"²

² *The Beryl*, 9 Prob. Div. 138, 139.

CHAPTER XII.

THE STEERING AND SAILING RULES.

- 125-127. Origin, Reasons on Which Based, and General Application.
- 128. Sail Vessels.
- 129. Steamers—The Port-Helm Rule.
- 130. The Crossing Rule.
- 131. Steam and Sail.
- 132. Privileged Vessels.
- 133. Crossing Ahead.
- 134. The Stop and Back Rule.
- 135. Overtaking Vessels.

ORIGIN, REASONS ON WHICH BASED, AND GENERAL APPLICATION.

- 125. Rules of navigation are the outgrowth of customs.
- 126. They are evolved from the comparative ease of handling the vessels, the rule of turn to the right, and the question whether there is risk of collision.
- 127. They regulate the relations of sail to sail, steam to steam, and steam to sail.

The fourth part of the navigation rules is the most important of all. It contains the steering and sailing rules, and prescribe the course which approaching vessels must take to avoid each other in every conceivable situation, and the signals to be given to indicate their respective intentions.

These rules, in the main, are not new. They are mere affirmations of previous long-established maritime customs, crystallized at last into positive enactments.

Reasons on Which Based.

There are three great underlying principles from which they are derived, for they are based on reason, and any one fixing firmly in his mind the reasons which gave them birth can, if gifted with a moderate knowledge of navigation and ship construction, think them out for himself.

(1) The first of these principles is that the less manageable type of vessel is privileged as regards the more manageable, and the latter has the burden of avoiding her. For example, sailing vessels are favored as against steamers, anchored vessels as against moving vessels, and vessels closehauled as against vessels with a free wind.

(2) Other things being equal, the rule of the road at sea is the same as on land; and the endeavor of these navigation rules is to make vessels, wherever possible, always pass to the right, like two vehicles on a public road.

(3) The rules are only intended to apply when vessels are approaching each other in such directions "as to involve risk of collision." A detailed examination of the rules will show that this qualifying phrase is embodied in nearly every one of them. The mere fact that vessels are in sight of, or even near, each other, navigating the same waters, does not bring these enactments into play. If their courses are parallel, and sufficiently far apart to clear with a safe margin, or if they are divergent, there is no need for rules of navigation, just as there is no need for rules of construction when the language is too plain to need construction.

Risk of Collision.

It is not easy to define as matter of law what is meant by the phrase "risk of collision." We may say, in the language of Justice Clifford in *The Dexter*,¹ that the rules are obligatory if the vessels are approaching in such directions as involve risk of collision on account of their proximity from the time the necessity for precaution begins.

In the case of *The Milwaukee*,² it is said: "Risk of collision begins the very moment when the two vessels have approached so near each other, and upon such courses, that, by departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about. It is true that *prima facie* each man has a right to assume that the other will obey the law. But this does not justify either in shutting his eyes to what the other may actually do, or in omitting to do what he can to avoid an accident made imminent by the acts of the other. I say the right above spoken of is *prima facie* merely, because it is well known that departure from the law not only may, but does, take place, and often. Risk of collision may be said to begin the moment the two vessels have approached each other so near that a collision might be brought about by any such departure, and continues up to the moment when they have so far progressed that no such result can ensue."

The preliminary to the steering rules gives one test by which to determine whether risk of collision exists. It is that the compass bearing of the approaching vessel does not change. If their courses are parallel, a sharp angle at a distance becomes larger as they approach, and, conversely, if the angle remains constant, their courses must be converging. It may be necessary to recur to the meaning of this phrase "risk of collision" in connection with the separate rules.

SAIL VESSELS.

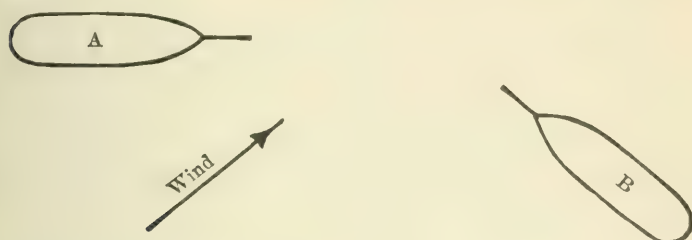
- 128. Which of two sailing vessels approaching each other so as to involve risk of collision must keep out of the way of the other is determined by their respective courses and situations, with reference to the direction of the wind and their relative positions.**

² 1 Brown, Adm. 313, Fed. Cas. No. 9,626.

Sail vessels approaching each other so as to involve risk of collision regulate their movements as follows:

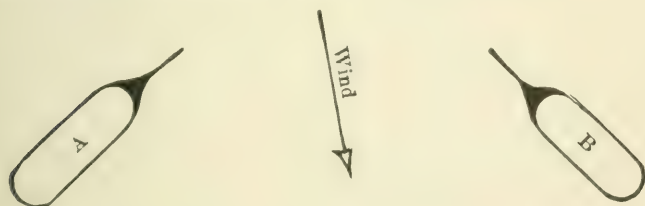
(a) A vessel which is running free shall keep out of the way of a vessel which is closehauled.

This is because she is more manageable. The wind is free when the vessel could shape her course still further to windward. Thus:



A must keep out of the way of B.¹

(b) A vessel which is closehauled on the port tack shall keep out of the way of a vessel which is closehauled on the starboard tack. When a vessel is on the port tack, her sails swing over the starboard side, the wind being on her port side, and vice versa. Hence this rule is based on the principle of turn to the right. The vessel closehauled on the starboard tack cannot turn to the right, as the wind is on that side; therefore the other one must. Thus:

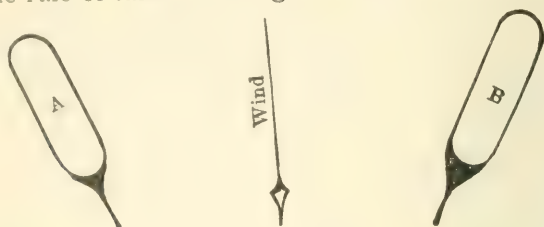


A. must keep out of the way.²

§ 128. ¹ The Robert Graham Dun, 17 C. C. A. 90, 70 Fed. 270; The William Churchill (D. C.) 103 Fed. 690.

² The Ada A. Kennedy (D. C.) 33 Fed. 623; The Margaret B. Roper (D. C.) 103 Fed. 886.

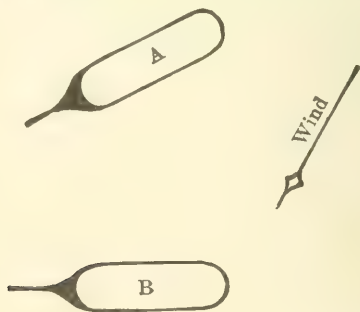
(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other. This also springs from the rule of turn to the right. Thus:



A. must keep out of the way, because the wind facilitates her porting or turning to the right, and interferes with the other's doing it.³

We will see later on that, with two steamers as in the diagram, the rule is just the opposite. B. then keeps out of the way, which she can do by porting, and passing astern, as a steamer is independent of the wind.

(d) When both are running free with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward. Thus:

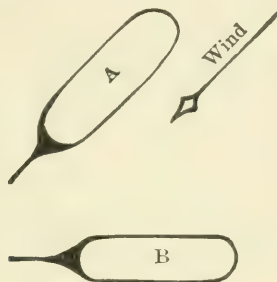


A. keeps out of the way. He has the weather gauge, about which we read so much in naval warfare before the innovation of steamers.

³ The Rolf, 1 C. C. A. 534, 50 Fed. 478.

This rule is based on the fact that the vessel to windward is the more manageable of the two.⁴

(e) A vessel which has the wind aft shall keep out of the way of the other vessel: Thus:



A. keeps out of the way of B. The reason is that she is more manageable.⁵

STEAMERS—THE PORT-HELM RULE.

129. Steamers, meeting end on, port their helms, and pass to the right, indicating their intention by one whistle each. But, if they are approaching well on each other's starboard bow, they starboard, and pass to the left, each blowing two whistles.

The use of sail vessels is becoming more restricted every year, and a vast proportion of the world's commerce is now carried in steamers. For this reason, collisions between steamers constitute the bulk of the cases which now find their way into the courts.

Article 18 embodies the first and most important rule of those governing steamers. It says that, when two steam

⁴ The Nahor (D. C.) 9 Fed. 213.

⁵ The Mary Augusta (D. C.) 55 Fed. 343.

vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. This is called the "port-helm rule," as it takes a port helm to make a ship move to starboard.

Under article 28, the steamer indicates her intention by blowing one short blast of about one second's duration, which is answered by the other steamer, and thus a perfect understanding is established.

Under the old rules it was a matter of some doubt how near the steamers must be meeting end on in order to bring this rule into play. The present article in the explanatory paragraph following the navigation rule itself expresses very clearly the result of the decisions. If they are moving on courses that, if held, would pass clear, then there is no risk of collision, and no rule is necessary.¹ If, however, by day each sees the other's masts in a line with his own, or nearly so, or if by night each sees both side lights of the other, then they are moving right at each other, and each must port, and signify by his one blast that he is porting.²

If, on the other hand, it is a case of red light to red light, or green light to green light, the rule does not apply.³

The Lake Rule is the same, except that it has no explanatory note as to the cases to which the rule applies. But, as that note is a mere affirmation of the decisions, the courts would probably apply it.

Both the Lake Rules and the Mississippi Valley Rules, as supplemented by the Supervising Inspectors' Regulations, are much influenced by the necessity of allowing for the effect of the current on ease of navigation. It is a general principle that a boat moving against the current is more

§ 129. ¹ *The City of Macon*, 34 C. C. A. 302, 92 Fed. 207.

² *The Thingvalla*, 1 C. C. A. 87, 48 Fed. 764.

³ *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095.

manageable than one moving with it, and that the latter should have the greater rights.⁴

The Inland Rules, so far as they apply to steamers, go into much more detail than the International Rules. The one corresponding to the port-helm rule expressly provides that vessels meeting so far on each other's starboard side as not to be considered head and head may give two blasts, and starboard. The port-helm rule may be illustrated thus:



The starboard-helm rule may be illustrated thus:⁵



The Inland Rules contain other provisions under this article not found in the International Rules. For instance, rule 3, under this article, provides that, if either of two approaching vessels fails to understand the course or intention of the other, he shall signify it by giving several short and rapid blasts, not less than four, of his steam whistle.⁶ These are called the "danger signals," and are usually the

⁴ *The Galatea*, 92 U. S. 439, 23 L. Ed. 727; *The Diana* [1894] App. Cas. 625.

⁵ *The James Bowen*, 10 Ben. 430, Fed. Cas. No. 7,192; *The Ogdensburgh*, 5 McLean, 622, Fed. Cas. No. 17,158.

⁶ *The Mahar & Burns* (D. C.) 106 Fed. 86.

last despairing wail before the crash. No such provision is contained in the International Rules, though it is a well-established practice among mariners. Lake Rule 26 prescribes substantially the same rule as to signaling as the above.

Rule 5 of the Inland Rules, in the same article, requires steamers, before rounding bends in a river or channel where the view is cut off, to blow one long whistle as a warning, and requires the same signal from vessels leaving a dock. In crowded harbors, or much frequented channels of navigation, this is a very important precaution, and many cases have arisen under it.⁷

Rule 8 regulates overtaking vessels. It corresponds to International Rule 24, and will be discussed in that connection.

Rule 9 of the same article provides that the passing signals must only be used by vessels in sight of each other, and able to ascertain each other's course or position. When this is impossible from fog or other cause, then fog signals are used. International Rule 28 also provides that these signals are only to be used by vessels in sight of each other. But Lake Rule 23 requires them to be given "in all weathers," which makes it strikingly different from the other rules.

SAME—THE CROSSING RULE.

130. Of two crossing steamers, the one having the other on her starboard bow must keep out of the way.

Article 19 covers the case when two steamers are crossing so as to involve risk of collision. In such case the vessel which has the other on her starboard side must keep out of the way.

⁷ The *Pekin* [1897] App. Cas. 532; The *Gamma* (D. C.) 103 Fed. 762; The *Chicago* (D. C.) 101 Fed. 143; The *Mourne* [1901] Prob. 68.

Vessels are crossing when they show opposite sides to each other, and are so nearly even that one cannot be considered an overtaking vessel. **Thus:**



A. keeps out of the way.

This is a modification of the port-helm rule, as the vessels ordinarily pass to the right of each other. The cases under this rule have been very numerous.¹

The difficulty in applying this rule has usually arisen in drawing the line between a crossing vessel and an overtaking vessel. In the above-cited case of *The Cayuga*, the supreme court made it a crossing case where one vessel was abaft the beam of the other. This would hardly seem to be correct. The line between an overtaking vessel and a crossing vessel is the range of the side lights; that is, any vessel two points or less abaft the beam is a crossing vessel, any vessel more than two points abaft the beam is an overtaking vessel.²

This is adopted as the test in article 24, and therefore the decision in the *Cayuga* Case is not law now, if it ever was. In a winding river it is frequently difficult to say whether two ships are crossing or not. In such case the question is determined, not by the accidental bearing, but by the general channel course.³

§ 130. ¹ *The Cayuga*, 14 Wall. 275, 20 L. Ed. 828; *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. 794, 35 L. Ed. 453; *THE BREAK-WATER*, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139.

² *The Auranla* (D. C.) 29 Fed. 99.

³ *The Velocity*, L. R. 3 P. C. 44; *The Pekin* [1897] App. Cas. 532; *The L. C. Waldo*, 40 C. C. A. 517, 100 Fed. 502.

STEAM AND SAIL.

131. A steamer must keep out of the way of a sail vessel. In doing so she must allow the sail vessel a wide berth.

Article 20 regulates their relations, and provides that, when a steam vessel and a sail vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

This rule is based upon the greater handiness of steamers, which are independent of wind and tide, and can even move backwards, if necessary. It often looks like a hard rule, as the smallest oyster puny can block the narrow channel available to an ocean steamer. As it is based upon the greater mobility of the steamer, the courts have not always enforced it rigidly when such mobility did not exist. For instance, a tug and tow, though, in the eye of the law, one vessel, and that a steamer, are often less manageable than a sail vessel. The tug cannot back, and, if her tow is large or unwieldy, cannot turn around except slowly. She is less manageable in fact than a sail vessel with a free wind, and hence the courts have more than once held the sail vessel in such circumstances is required to do something.¹

The question would turn largely on the degree of her embarrassment, with the presumptions against the tug, for exceptions to the rules must be introduced with great caution.²

A steamer may take her own method of passing a sail vessel. The mere approach of the two vessels does not bring about risk of collision. The steamer may assume that the sail vessel will do her duty, and do nothing to embarrass her. Hence the steamer may shape her course so as to

§ 131. ¹ *The Marion W. Page* (D. C.) 36 Fed. 329; *The Minnie C. Taylor* (D. C.) 52 Fed. 323; *The Rose Culkin* (D. C.) 52 Fed. 328.

² *The Marguerite* (D. C.) 87 Fed. 953.

avoid the sail vessel, and then go along at her ordinary speed under the assumption that the sail vessel will not interfere with her. If the steamer's course is such that it does not converge, she can go along without making any change.³

This rule that vessels may each assume that the other will obey the law is one of the most important in the law of collision. Were it otherwise, and were vessels required to take all sorts of measures to keep out of the way when they are not in each other's way, navigation would be impossible. It is like the land negligence rule that an engineer need not stop his train merely on seeing some one on the track, but may assume that he will have intelligence enough to get off. Rules more rigid would break up traffic by land or sea. There is, however, one important qualification which must be borne in mind. It is that a steamer must not approach so near a sailing vessel, and on such a course, as to alarm a man of ordinary skill and prudence. If the man on the sailing vessel makes an improper maneuver, he is not responsible. It is what is called an "error in extremis." It is difficult to lay down any rule defining how close a steamer may run to a sail vessel without infringing this rule, as it depends on the width of the channel and many other special circumstances. It depends largely on the course she is steering. If that course is parallel, and so far off that she is showing only one side light to the schooner, then she is all right; for any mariner of average intelligence knows that in such case the vessels will not strike if each keeps his course, and therefore has no right to lose his head. The leading case on the subject is *THE LUCILLE*.⁴ In that case a steamer and schooner were approaching on converging courses only half a point apart, so that they would have come within thirty yards of each other, and that in Ches-

³ *The Scotia*, 14 Wall. 181, 182, 20 L. Ed. 822; *The Free State*, 91 U. S. 200, 23 L. Ed. 299.

⁴ 15 Wall. 679, 21 L. Ed. 247.

apeake Bay. The court held that this was too close, and condemned the steamer. The report does not tell how the lights showed, but, if their courses were only half a point apart, this would make each see both side lights of the other, and indicate that they were coming right end on.⁵

Another interesting case on this subject is that of *The Chatham*.⁶ There a schooner going down the Elizabeth river saw an ocean steamer approaching, which showed only her red light (indicating a parallel course) until 50 or 75 yards off, when she showed both, indicating a course straight for the schooner. This alarmed the men on the schooner, and they starboarded, and thereupon the vessels struck. The court held that the steamer, having plenty of room, was in fault for running so close, and that the act of the schooner, even if wrong, was an error in extremis.⁷

The test laid down in this case is that the proximity of the steamer, and her course and speed, must be such that a mariner of ordinary firmness and competent knowledge and skill would deem it necessary to alter his course to make the vessel pass in safety.

If, therefore, the steamer, though running close, shows by her lights that her course is not converging, she is within the law, and the other vessel must assume that she will stay within the law and navigate accordingly.⁸

⁵ *The Fannie*, 11 Wall. 238, 20 L. Ed. 114.

⁶ 3 C. C. A. 161, 52 Fed. 396.

⁷ *The E. Luckenbach*, 35 C. C. A. 628, 93 Fed. 841.

⁸ *The Gate City* (D. C.) 90 Fed. 314. See, also, *Merchants' & Miners' Transp. Co. v. Hopkins* (C. C. A.) 108 Fed. 890.

PRIVILEGED VESSELS.

132. A vessel having the right of way must keep her course and speed, and the other vessel may assume that she will do so.

By article 21, when by any of these rules one of two vessels is to keep out of the way, the other must keep her course and speed. This renders it obligatory on the vessel which has the right of way to pursue her course at the speed which she had been keeping up previously. She must rely on the other vessel to avoid the collision, and not embarrass her by any maneuver. All she need do is to do nothing. Then the other vessel knows what to expect, and navigates accordingly.

This rule applies to all the other steering and sailing rules. Under it, when the sail vessel running free keeps out of the way, the closehauled vessel keeps her course. Between two crossing steamers, when the one on the left keeps out of the way, the other keeps her course. Between a steamer and a sail vessel, when the steamer keeps out of the way, the sail vessel keeps its course.

The principle is the same in all these different contingencies. It may be illustrated by one or two decisions.

In *THE BRITANNIA*,¹ which was a collision in New York harbor, the steamer Beaconsfield had the right of way over the Britannia, under the crossing rule. The Britannia failed to keep out of the way, and thereupon the Beaconsfield stopped and reversed. The supreme court held that she should have kept her course, and was in fault for stopping and reversing.²

In *THE BREAKWATER*,³ which also was a crossing

§ 132. ¹ 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660.

² *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Mexico*, 28 C. C. A. 472, 84 Fed. 504.

³ 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139.

case, the privileged vessel did keep on, and the court held that she did right.

In collisions between steam and sail vessels the steamer's defense is almost invariably that the sail vessel changed her course.⁴

The corresponding Mississippi Valley Rule is rule 23 (Rev. St. § 4233), which says that the privileged vessel must keep her course, and says nothing as to speed. It is likely, however, that the courts will hold it to mean substantially what the others mean. In fact, under the strong intimation of the supreme court in *THE BRITANNIA*, *supra*, it certainly means that she must keep some speed, even if it does not mean that she must keep her previous speed.⁵

CROSSING AHEAD.

133. The burdened vessel must avoid crossing ahead of the other, if practicable.

Rule 22 requires every vessel which is directed to keep out of the way to avoid crossing ahead, if circumstances admit. This was long a practice of seamen, "Never cross the bow when you can go astern," but was for the first time made a rule in the rules of 1890. The Inland Rules have the same provision, but not the Lake Rules or Mississippi Valley Rules.

⁴ *The Adriatic*, 107 U. S. 512, 2 Sup. Ct. 355, 27 L. Ed. 497; *The Marguerite* (D. C.) 87 Fed. 953; *The Gate City* (D. C.) 90 Fed. 314.

⁵ *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

THE STOP AND BACK RULE.**134. The burdened steamer must slacken, stop, or reverse, if necessary, to avoid collision.**

Article 23 provides that every steam vessel which is directed by those rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse.

This rule is radically changed from its old form. Until the revision of 1890, it required every steam vessel, when approaching another vessel so as to involve risk of collision, whether the other had the right of way or not, to resort to these maneuvers. The courts, however, had settled that this was not necessary as long as the vessels were moving on such courses that, if each one did his duty, as could be assumed by each, no collision would happen. These authorities have been cited in another connection. The present rules require this maneuver only of the burdened vessel, and require the privileged vessel not only to keep her course, but her speed as well.

The Mississippi Valley Rules still have the rule in its old form, applying to all steamers, and not simply those required to keep out of the way. This great change in the rule renders it necessary to be circumspect in citing cases arising before the change, as many vessels might have been obliged to stop and back then which would not be required to do so now. A privileged vessel, which stops and backs now, unless at the last moment as a desperate effort to avert certain collision, would commit a fault, instead of obeying the law.¹

Under article 28 of the International Rules and Inland Rules, the signal of three short blasts is required to be given as a notification of this action. They mean, "My engines

§ 134. ¹ *The Mary Powell*, 34 C. C. A. 421, 92 Fed. 408.

are at full speed astern." In the other rules three blasts do not necessarily mean this.²

OVERTAKING VESSELS.

135. The overtaking steamer must keep out of the way.

Article 24 provides that, notwithstanding anything contained in these rules, any vessel overtaking any other vessel shall keep out of the way of the overtaken vessel.

Under the crossing rule, the true test between an overtaking and a crossing vessel has been shown. This rule adopts that test, and makes any vessel more than two points abaft the beam an overtaking vessel, and solves all cases of doubt by treating them as overtaking vessels.

The only signals prescribed by the International Rules for this case are the general ones contained in article 28, one blast meaning that the vessel is directing her course to starboard, and two that she is directing her course to port. But the Inland Rules in article 18, rule 8, prescribe special rules for the case. They require the last vessel to blow one blast if she wishes to pass to the right, and the forward one to answer it; two if she wishes to pass to the left, and the forward one to answer it. If the pilot of the front steamer thinks that they cannot safely pass, he answers the signal of the other steamer by several short blasts, whereupon the second steamer must wait until the forward steamer gives the assenting signal; and the forward steamer must not crowd upon the overtaking one. The Lake Rules and Mississippi Valley Rules have substantially the same provisions on the subject. The overtaking vessel must pass at a suf-

² As to the application of this rule, see *The Oporto* [1897] Prob. 249; *The Victory*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Mournie* [1901] Prob. 68.

ficient distance to avoid danger of suction. She is in fault if collision is caused by her running too close.¹

While the overtaken steamer must keep her general course, and the second steamer may so assume, yet if the first has exchanged signals with another boat which she is meeting, and is changing her course to conform thereto, the steamer overtaking her must take note of this change, and regulate her navigation accordingly.²

The overtaking steamer may assume that the first steamer will navigate according to the rule.³

The overtaking steamer, as she is passing, must not try to cut across in front too quickly. If she does, and renders collision inevitable, the other should back; not by virtue of the stop and back rule, as that does not apply to her, being the privileged vessel, but by virtue of the general prudential rule,⁴ or the precaution rule.⁵

§ 135. ¹ *The City of Brockton* (C. C.) 42 Fed. 928; *The Ohio*, 33 C. C. A. 667, 91 Fed. 547.

² *The Whitewash* (D. C.) 64 Fed. 893.

³ *Long Island R. Co. v. Killien*, 14 C. C. A. 418, 67 Fed. 365.

⁴ Int. art. 27.

⁵ Int. art. 29; *The Willkommen* (D. C.) 103 Fed. 699.

CHAPTER XIII.

RULES AS TO NARROW CHANNELS, SPECIAL CIRCUMSTANCES, AND GENERAL PRECAUTIONS.

- 136. The Narrow Channel Rule.
- 137. The General Prudential Rule, or Special Circumstance Rule.
- 138. Sound Signals.
- 139. The General Precaution Rule.
- 140. Lookouts.
- 141. Anchored Vessels.
- 142. Wrecks.
- 143. The Stand-by Act.

THE NARROW CHANNEL RULE.

136. In narrow channels each steamer must keep to the right-hand side.

Article 25 provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

This is really a branch of the port-helm rule. The latter rule applies when the vessels are meeting end on, no matter whether they are in a harbor or a narrow channel, no matter whether they are following a channel or crossing it. The starboard-hand rule emphasizes this duty as to narrow channels. It means that each must keep along its own right-hand side, no matter how the relative bearings may be from sinuosities or other causes.¹

This rule was only added to the inland rules by the recent act of June 7, 1897, though it had been in the International Rules since the revision of 1885. The courts, however, are

§ 136. ¹ THE VICTORY, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 410.

rigid in enforcing it. As it has been brought into the Inland Rules so recently, a few illustrations might prove profitable.

The Spearman² arose on the Danube, under a local rule substantially similar. The descending vessel took the left bank, and was held in fault for a collision with an ascending vessel, though the absence of lights on the latter might have contributed to the accident.

The Pekin³ was a collision case in the river Whang Poo, in China, at a point where there was a sharp bend. The Normandie, in descending, kept to the starboard side, and the Pekin was ascending. This threw the Pekin on the Normandie's starboard bow on account of the bend, and she therefore claimed that it was a crossing case, and that under rule 19 she had the right of way. The house of lords, however, held that the course must be judged, not by the accidental bearing at a bend, but by the general channel course, and that the Pekin was to blame for cutting across to the Normandie's side.

Another interesting English case in which the rule was applied was *The Oporto*.⁴

In *The Spiegel*,⁵ Judge Coxe applied the rule to a collision on the Erie Canal at night, placing the responsibility on a boat which was on the wrong side.

The rule applies in fogs as well as in clear weather.⁶

What Constitutes a Narrow Channel.

It is not an easy matter to define what constitutes a narrow channel. In the leading case of *THE RHONDDA*,⁷ the house of lords held that the Straits of Messina were in-

² 10 App. Cas. 276.

³ [1897] App. Cas. 532.

⁴ [1897] Prob. 249.

⁵ (D. C.) 84 Fed. 1002.

⁶ *The Yarmouth* (D. C.) 100 Fed. 667; *The Newport News*, 44 O. C. A. 541, 105 Fed. 389.

⁷ 8 App. Cas. 549.

cluded in the term, and in *The Leverington*⁸ it was held that the Cardiff Drain, where it joins the entrance channel to the Roath Basin, came within the designation.

In the case of *Occidental & O. S. S. Co. v. Smith*,⁹ it was held to include the entrance to San Francisco harbor. So with *Providence river*.¹⁰

As the only object of the rule is to avoid collision, the common sense of the matter would seem to be that, as it does not apply to all channels, but only to narrow channels, a channel is not narrow, in the sense of the term, unless vessels approaching each other in it are compelled to approach on such lines as would involve "risk of collision" in the sense of the navigation rules. If it is wide enough to permit two steamers to pass at a safe distance without the necessity of exchanging signals, the rule would not apply; and it would be idle to require two steamers to cross to the other side. But if it is so narrow by nature, or so narrowed by anchored vessels or other causes, as to bring approaching steamers on lines in dangerous proximity, and require interchange of signals, then the rule would apply.

It hardly seems to apply to harbors. Steamers moving from one wharf to another further down on the same side can scarcely be expected to cross the harbor and then cross back.

It will be observed that this rule is very cautiously worded. It only applies when it is "safe and practicable," and it only requires the "ship to keep to the right of the fairway or mid-channel." This means the water available for navigation at the time. For instance, if half of a narrow channel was obstructed by anchored vessels, the "fairway or mid-channel" would mean the part still unobstructed, and require the vessel to keep on her half of the channel still re-

⁸ 11 Prob. Div. 117.

⁹ 20 C. C. A. 419, 74 Fed. 261.

¹⁰ *The Berkshire*, 21 C. C. A. 169, 74 Fed. 906.

maining, even though that was not on the starboard side of the ordinary navigable channel. It would not be "safe and practicable" to do otherwise.¹¹

Neither the Lake Rules nor the Mississippi Valley Rules contain this provision, but they have their own rules for narrow channels, the substance of which is that the boat with the current has the right of way. In the Lake Rules she must give the first signal, but in the Mississippi Valley Rules the ascending steamer does so.

But under the Mississippi Valley Rules the courts seem to require each boat to keep to the right side as a matter of careful navigation.¹²

THE GENERAL PRUDENTIAL RULE, OR SPECIAL CIRCUMSTANCE RULE.

137. The general prudential rule, or special circumstance rule, allows departure from the other rules, but only in extreme cases.

Article 27 provides that in obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above necessary in order to avoid immediate danger.

In the multitude of possible situations in which vessels may find themselves in relation to each other, there are necessarily occasional cases in which obstinate adherence to the rule would cause collision, when disregard of it might prevent it. This rule is made for such cases. These exceptional circumstances usually arise at the last moment, so

¹¹ On the meaning of these words, see *Smith v. Voss*, 2 Hurl. & N. 97; *THE RHIONDDA*, 8 App. Cas. 549; *The Clydach*, 5 Asp. 336; *The Leverington*, 11 Prob. Div. 117; *The Oliver* (D. C.) 22 Fed. 849.

¹² *The Albert Dumois*, 31 C. C. A. 315, 87 Fed. 948, 177 U. S. 240, 20 S. Ct. 595, 44 L. Ed. 751.

that this rule has well been designated the rule of "*saue qui peut*." It cannot be used to justify violations of the other rules, or to operate as a repeal of them. The certainty resulting from the enforcement of established rules is too important to be jeopardized by exceptional cases. Any rule of law, no matter how beneficial in its general operation, may work occasional hardship. Hence the courts lean in favor of applying the regular rules, and permit departure from them only in the plainest cases.

The principle which governs such cases existed and was applied long before it was enacted in the present rule. It is well expressed by Dr. Lushington in the case of *The John Buddle*,¹ where he said: "All rules are framed for the benefit of ships navigating the seas, and, no doubt, circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule, however wisely framed. It is at the same time of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such deviation necessary are most distinctly proved and established; otherwise vessels would always be in doubt and doing wrong."

In *The Khedive*,² two vessels were approaching each other green light to green light, when suddenly one ported, thereby establishing risk of collision. The captain of the other starboarded, under the belief that this would bring the vessels parallel, and at least ease the blow. He did not reverse, as required by rule 23 as then worded. It was contended for him that he was justified under the special circumstances, but the house of lords held that the stop and back rule governed, and that this rule could not be invoked to excuse noncompliance with the stop and back rule.

In the case of *The Benares*,³ a vessel saw a green light a

¹ 137. 15 N. C. 387.

² 5 App. Cas. 876.

³ 9 Prob. Div. 16.

little on her port bow. When they came close together, she saw the port side, but no red light where it should have been. She thereupon starboarded, and went full speed ahead, instead of backing and reversing. The court held that it was an exceptional case, governed by the general prudential rule, and that she had done right; and that a departure is justified when it is "the one chance still left of avoiding danger which otherwise was inevitable."⁴

The American courts have been equally reluctant to admit exceptions. In *The Clara Davidson*,⁵ the court said: "But I do not find myself at liberty to ignore the inquiry whether a statutory rule of navigation was violated by the schooner. Those rules are the law of laws in cases of collision. They admit of no option or choice. No navigator is at liberty to set up his discretion against them. If these rules were subject to the caprice or election of masters and pilots, they would be not only useless, but worse than useless. These rules are imperative. They yield to necessity, indeed, but only to actual and obvious necessity. It is not stating the principle too strongly to say that nothing but imperious necessity, or some overpowering vis major, will excuse a sail vessel in changing her course when in the presence of a steamer in motion; that is, obeying the duty resting upon it or keeping out of the way. If the statutory rules of navigation were only optionally binding, we should be launched upon an unbounded sea of inquiry in every collision case, without rudder or compass, and be at the mercy of all the fogs and mists that would be made to envelop the plainest case, not only from conflicting evidence as to the facts, but from the hopelessly conflicting speculations and hypotheses of witnesses and experts as to what ought to or might have been done before, during, and after the event. The statutory regulations that have been wisely and charitably de-

⁴ See, also, *The Mournie* [1901] Prob. 68.

⁵ (D. C.) 24 Fed. 763.

vised for the governance of mariners furnish an admirable chart by which the courts may disentangle themselves from conflicting testimony and speculation, and arrive at just conclusions in collision cases."

In *THE BREAKWATER*,⁶ where, in a crossing case, the privileged vessel kept her course and speed, and was attacked because she did not reverse, the court said: "Where rules of this description are adopted for the guidance of seamen who are unlearned in the law, and unaccustomed to nice distinctions, exceptions should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in rule 24, which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger. The moment the observance or nonobservance of a rule becomes a matter of doubt or discretion, there is manifest danger, for the judgment of one pilot may lead him to observe the rule, while that of the other may lead him to disregard it. The theory of the claimant that a vessel at rest has no right to start from her wharf in sight of an approaching vessel, and thereby impose upon the latter the obligation to avoid her, is manifestly untenable, and would impose a wholly unnecessary burden upon the navigation of a great port like that of New York. In the particular case, too, the signals exchanged between the steamers indicated clearly that the Breakwater accepted the situation and the obligation imposed upon her by the starboard-hand rule, and was bound to take prompt measures to discharge herself of such obligation."

In *The Non Pareille*,⁷ the court said: "There is no such thing as a right of way to run into unnecessary collision. The rules of navigation are for the purpose of avoiding collision, not to justify either vessel incurring a collision unnecessarily. The supreme duty is to keep out of collision.

⁶ 155 U. S. 252, 15 Sup. Ct. 99. 39 L. Ed. 139.

⁷ (D. C.) 33 Fed. 524.

The duties of each vessel are defined with reference to that object, and, in the presence of immediate danger, both, under rule 24, are bound to give way, and to depart from the usual rule, when adherence to that rule would inevitably bring on collision, which a departure from the rules would plainly avoid."

It is plain, therefore, that he who disregards the regular rules, and appeals to this one, shoulders a heavy burden. He is like the whist player who fails to return his partner's trump lead. He may be able to justify it, but explanations are certainly in order.⁸

SOUND SIGNALS.

138. A steamer must indicate to other vessels in sight the course taken by her, by giving sound signals.

Article 28 prescribes these, but they have been explained in a previous connection, and need not be repeated.

THE GENERAL PRECAUTION RULE.

139. Proper precautions, other than those required by the rules, are not to be neglected.

Article 29 provides that nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

This rule is intended as a supplement for the other rules,

⁸ The *Albert Dumois*, 31 C. C. A. 315, 87 Fed. 948, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751.

not as a substitute for them. It covers many cases not expressly included in the other rules.

SAME—LOOKOUTS.

140. The law is rigid in requiring a competent lookout, charged with that sole duty.

Perhaps the most common precaution is the necessity of a lookout. Both the English and American courts have said as emphatically as language can express it that vessels must have a competent lookout stationed where he can best see, and that he must be detailed to that sole duty. Neither the master nor helmsman, if engaged in their regular duties, can act as such, for they have troubles enough of their own. A good English illustration is *The Glannibanta*.¹

In *Clyde Nav. Co. v. Barclay*,² the steamer, which was on her trial trip, was in charge of a pilot, but an officer also was on the bridge, and there was another man, not properly qualified, on the lookout. The house of lords held this sufficient, and that the bridge was the proper place for the lookout under the circumstances.

The decisions of the American courts have been numerous and emphatic. In the case of *THE MANHASSET*,³ the leading cases on the subject were reviewed, and the difference between the duties of the master and lookout clearly put. In that case a ferryboat crossing Norfolk harbor on a stormy night was condemned for having no one on duty except the master at the wheel.

In fact, circumstances may arise where more than one lookout is necessary. Ocean steamers have been held in fault for not having two, if it appears that objects were not seen as soon as possible.⁴

§ 140. 11 Prob. Div. 283.

² 1 App. Cas. 790.

³ (D. C.) 34 Fed. 408.

⁴ *THE BELGENLAND*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

Under some circumstances—as where a vessel is backing, or another vessel is overtaking—there should be a lookout astern as well as forward.⁵

This rule as to lookouts must not be carried to a *reductio ad absurdum*. If the approaching vessels see each other an ample distance apart to take all proper steps, then the object of having a lookout is accomplished, and the absence of a man specially detailed and stationed is a fault not contributory, and therefore immaterial.⁶

The proper station for a lookout is where he can have an unobstructed view. It must be a place unobstructed by the sails, and is usually on the forecastle, or near the eyes of the ship.⁷

In the case of steamers, although courts discourage the practice of having the lookout in the pilot house, his proper location is a question of fact, not of law. The dissenting opinion of Chief Justice Taney in the case of *Haney v. Baltimore Steam-Packet Co.*,⁸ well puts the doctrine as follows: "It has been argued that the lookout ought to have been in the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court may always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout is obviously a question of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed,

⁵ *The Nevada*, 106 U. S. 154, 1 Sup. Ct. 234, 27 L. Ed. 149; *The Sarmatian* (C. C.) 2 Fed. 911.

⁶ *The Farragut*, 10 Wall. 338, 19 L. Ed. 946; *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; *THE HERCULES*, 26 C. C. A. 301, 80 Fed. 998.

⁷ *The Java*, 14 Blatchf. 524, Fed. Cas. No. 7,233; *The John Pridgen, Jr.* (D. C.) 38 Fed. 261; *The Bendo* (D. C.) 44 Fed. 439, 444.

⁸ 23 How. 292, 16 L. Ed. 562.

and the hazards she is likely to encounter; and must, like every other question of fact, be determined by the court upon the testimony of witnesses,—that is, upon the testimony of nautical men of experience and judgment. It cannot, in the nature of things, be judicially known to the court as a matter of law.”

The courts have ruled that this doctrine applies to all steamers, large and small, both as to the location of the lookout and the necessity of having a man independent of the master and wheelsman. In the case of tugs it is a rule more honored in the breach than in the observance. There is some excuse for it, as the pilot house of the tug is so far forward and so elevated as usually to afford the best view. And, in addition, the stem of a tug being low down in the water, unlike the lofty stems of large vessels, is so wet a place in a heavy sea that a lookout could do no good. Hence the courts, though insisting on their rule even as to tugs, especially in harbor work, and requiring strong proof to satisfy them that the want of a special lookout did no harm, are yet more lenient in such cases than in cases of large steamers. The instances in the books where tugs have been condemned in this respect were cases where the accident was directly traceable to such neglect.⁹

⁹ *City of Philadelphia v. Gavagnin*, 10 C. C. A. 552, 62 Fed. 617; *The George W. Childs* (D. C.) 67 Fed. 271. As instances where tugs were held blameless on this score, see *The Caro* (D. C.) 23 Fed. 734; *The Bendo* (D. C.) 44 Fed. 439; *The R. R. Kirkland* (D. C.) 48 Fed. 760; *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; *THE HERCULES*, 26 C. C. A. 301, 80 Fed. 998.

SAME—ANCHORED VESSELS.

141. When a moving vessel runs into a vessel anchored in a lawful place, with proper lights showing, or a bell ringing, if such lights or bell are required by rule, and with a proper anchor watch, the presumptions are all against the moving vessel, and she is presumed to be in fault, unless she exonerates herself.

The law in relation to collision with anchored vessels can best be classified under this twenty-ninth rule. The presumptions against the moving vessel in such a case are very strong. Practically her only defense is vis major, or inevitable accident.¹

If, however, there is any maneuver by which an anchored vessel, on seeing a collision imminent, can avoid or lighten it, she is required to do so. Sometimes the courts have held anchored vessels in such case required to sheer, or to let out additional chain, if they can do so.²

Anchoring in Channels.

How far it is negligent in an anchored vessel to anchor in a channel of navigation is a question of fact depending upon special circumstances. In the neighborhood of many ports there are designated anchorage grounds, and a vessel anchored in these grounds designated by proper authority is not at fault on the mere score of anchorage. In other places vessels have grounds designated not by any special authority, but by general usage, and in that case, if the ves-

§ 141. ¹ *The Le Lion* (D. C.) 84 Fed. 1011; *The Minnie* (D. C.) 87 Fed. 780; 40 C. C. A. 312, 100 Fed. 128.

² *The Sapphire*, 11 Wall. 164, 20 L. Ed. 127; *The Clara*, 102 U. S. 200, 26 L. Ed. 145; *The Oliver* (D. C.) 22 Fed. 848; *The Clarita*, 23 Wall. 1, 23 L. Ed. 146.

sel anchors where it has been customary to anchor, and anchors in such a way that ample room is left for the passage of vessels, whether by day or night, allowing all necessary margin for the uncertainties of wind or current, it would not be negligent so to anchor. But, if a vessel anchors in a channel of navigation in such a way as to plant herself in the necessary path of passing vessels, so that moving vessels in such case come into collision with her, she is liable at least to be held partly in fault for the resulting collision; and, if it was a matter of nice calculation whether the moving vessel could pass or not, she would be held solely in fault. A few illustrations of the method in which these general principles have been applied will serve to make it plainer.

In the case of *The Worthington*,³ a vessel anchored in the St. Clair river where it was customary to anchor, but left ample room for the passage of moving vessels. It was held that she was not to blame on the mere score of her anchorage, but that the situation imposed upon her increased vigilance in reference to keeping an anchor watch and proper light.

The cases of *The Oscar Townsend*⁴ and *The Ogemaw*⁵ were also cases of vessels anchored in the St. Clair river, in which the anchored vessel was held blameless.

On the other hand, in *The Passaic*,⁶ a vessel at anchor in the St. Clair river was held at fault, not so much for the mere fact of anchoring there as for anchoring herself in such a manner that she could not move or sheer either way, the other boat also being held in fault for running into her.

In *The S. Shaw*,⁷ a vessel anchored in the Delaware within the range of the lights, which was forbidden by the local statute. She was held at fault.

So, in *The La Bourgogne*,⁸ a steamer was held in fault for

³ (D. C.) 19 Fed. 836.

⁴ (D. C.) 17 Fed. 93.

⁵ (D. C.) 32 Fed. 919.

⁶ (D. C.) 76 Fed. 460.

⁷ (D. C.) 6 Fed. 93.

⁸ 30 C. C. A. 203, 86 Fed. 475.

anchoring in New York harbor, in a fog, outside the prescribed anchorage grounds.

In the recent case of *Ross v. Merchants' & Miners' Transp. Co.*,⁹ certain barges were anchored in such a way as to obstruct the channel, and there was strong evidence also that they did not have up proper lights. The court decided that they were to blame for adopting such an anchorage.

This doctrine of obstructing narrow channels has the merit of great antiquity. Article 26 of the Laws of Wisbuy provides: "If a ship riding at anchor in a harbour, is struck by another ship which runs against her, driven by the wind or current, and the ship so struck receives damage, either in her hull or cargo; the two ships shall jointly stand to the loss. But if the ship that struck against the other might have avoided it, if it was done by the master on purpose, or by his fault, he alone shall make satisfaction. The reason is, that some masters who have old crazy ships, may willingly lie in other ships' way, that they may be damnify'd or sunk, and so have more than they were worth for them. On which account this law provides, that the damage shall be divided, and paid equally by the two ships, to oblige both to take care, and keep clear of such accidents as much as they can."

These decisions were all rendered independent of statutory provision.

In the appropriation act of March 3, 1899, congress made elaborate provisions for the protection of navigable channels, not only against throwing obstructions overboard, but against illegal anchorage. Sections 15 and 16 of that act¹⁰ provided that it should not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft, and imposed a penalty not only upon the navigator who put them there, but upon the vessel itself.

⁹ 43 C. C. A. 538, 104 Fed. 302.

¹⁰ 30 Stat. 1152, 1153.

How far this statute changes the previously existing law has not yet been decided. In one sense of the word, any vessel that anchors in a navigable channel obstructs navigation to some extent; and the act, if literally construed, would forbid any anchorage in a navigable channel. Even local regulations of harbor boards or other such officers could not justify it, for an act of congress supersedes all such legislation on the subject, and such officers have no more authority to violate it than navigators. In addition, the vessel would be liable even though she were put there by a local harbor master or local pilot, because, under the principles laid down in *The China*,¹¹ the vessel herself would be the offender in such case, and could not plead the act of a compulsory navigator in her defense.

It is hardly possible, however, that congress meant by this act to forbid vessels absolutely from anchoring in navigable channels. If their draught of water is so great that they can only navigate in a channel, it is so great that they can only anchor there. At the same time, any great draught and the necessities of the occasion could not be used as an excuse to blockade the channel.

The true meaning of the act probably is that vessels are thereby forbidden from completely obstructing the channel, or so obstructing it as to render navigation difficult. The language of the act is, "prevent or obstruct." Hence, if a vessel anchors in a navigable channel, where other vessels had been accustomed to anchor, and anchors in such a way as to leave a sufficient passageway for vessels navigating that channel, she can hardly be held to violate this statute. If she was put there by local authority,—as by a local pilot or harbor master,—that would be evidence in her favor to show that she was not guilty of negligence; but even that would not excuse her for completely obstructing the channel, or so far obstructing it as to render navigation around

¹¹ 7 Wall. 53, 19 L. Ed. 67.

her difficult. Neither the vessel herself nor any local authority can be justified in blockading or rendering it unreasonably difficult.

In the City of Reading,¹² a vessel was anchored outside the regular harbor grounds by a pilot,—a fact unknown to her officers, as they were strangers in the port. District Judge McPherson held that the vessel was not negligent for such an anchorage under such circumstances. The learned judge does not cite the China Case in his opinion. It is difficult to understand how his decision can be reconciled with that case. Nor does he allude to the act of congress above referred to, although the accident happened on September 18, 1899, six months after the act went into effect.

In the absence of any construction of this statute by the court, the author believes that the above is the real intention of the act, and will be finally adopted when the matter comes up for judicial decision.

SAME—WRECKS.

142. The owner of a vessel sunk in collision is not liable for subsequent damages done by her if he abandons her, but is liable if he exercises any acts of ownership. In the latter case he is required to put a beacon on her at night, and a plain buoy in the day.

The reason why an owner who abandons a vessel is not liable for any further damage is that his misfortune is already great enough, and, if he feels that he cannot afford to save his vessel, the courts will not add to his responsibility. Under the federal statutes the government takes charge of abandoned wrecks, and blows them up, or otherwise destroys them; or, if it does not care to do so, sells the wreck

¹² (D. C.) 103 Fed. 696; affirmed (C. C. A.) 108 Fed. 679, on another point.

after a certain advertisement, and requires the purchaser to remove them as obstructions from the channel.¹

The law on this subject of the duty of owners of sunken wrecks may be seen from the cases of *The Utopia*,² *U. S. v. Hall*,³ and *Ball v. Berwind*.⁴

If the owner, instead of abandoning his wreck, decides to raise her, he is then responsible for any injury done by her from the failure to take proper precaution.

In fact, this is one case where there may be a liability even for the acts of an independent contractor. As a general rule, when an independent contractor is employed to undertake work which an employer can lawfully let out to contract, he alone, and not the owner, is responsible;⁵ but, where the act that is being done is unlawful in itself, then the owner may be responsible, even for the acts of an independent contractor. To obstruct a navigable channel without giving proper notice is an act unlawful in itself, just as the obstruction of a highway or street would be under similar circumstances; and therefore, when the owner of a vessel is having her raised by an independent contractor, and the contractor omits to put proper lights or buoys upon the wreck, the owner also is liable; and he is liable for any lack of due diligence in raising the wreck.⁶

In the case of *McCaulley v. Philadelphia*,⁷ a different conclusion was reached under somewhat different facts. While the decision may be justified on the special facts, the English case above cited seems to agree better with principle.

§ 142. ¹ Act March 3, 1899 (30 Stat. 1154, §§ 19, 20).

² [1893] App. Cas. 492.

³ 11 C. C. A. 294, 63 Fed. 473.

⁴ (D. C.) 29 Fed. 541.

⁵ Ante, pp. 188-192.

⁶ *The Snark* [1899] Prob. 74; *Id.* [1900] Prob. 105.

⁷ (D. C.) 103 Fed. 661.

THE STAND-BY ACT.

143. This act requires colliding steamers to stay by each other regardless of the question of fault, on pain of being presumed negligent if they disregard this duty.

The act of September 4, 1890, provides as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default.

"Sec. 2. That every master or person in charge of a United States vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of one thousand dollars, or imprisonment for a term not exceeding two years; and for the above sum the vessel shall be liable and may be seized and proceeded against by process in any district court of the United States

by any person; one-half such sum to be payable to the informer and the other half to the United States.”¹

This is a copy of the English act on the same subject, and is intended to prevent a ship, even if faultless herself, from leaving the other to her fate, and also to give the information necessary as the basis of any proceeding for damages.

Presumptions against Violator of Act.

The act merely raises a presumption in the absence of evidence to the contrary. Hence, if the case is tried on plenary proofs, the act does not do more than shift a nicely-balanced burden of proof. The master may be punished for his inhumanity under the second section, but his innocent owners cannot be mulcted in damages on that account if their vessel was guiltless of contributing to the collision. As Dr. Lushington says in *The Queen of the Orwell*:² “Now for the penalty, or what may be called the penalty: ‘In case he fails so to do, and no reasonable excuse for said failure,’ it shall be attended with certain consequences which are enumerated in the enactment. The effect of that, I think, is precisely what has been stated,—that, supposing such a state of things to occur, there is thrown upon the party not rendering assistance the burden of proof that the collision was not occasioned by his wrongful act, neglect, or default. It does not go further. Assuming this case to come within the provisions of the statute, the proper question I shall have to put to you is that which I should put if no such statute at all existed: whether this collision was occasioned by the wrongful act, neglect, or default of the steamer.”

The leading American case on the subject is *THE HERCULES*.³

§ 143. 1 26 Stat. 425.

² 1 M. L. Cas. (O. S.) 300.

³ 26 C. C. A. 301, 80 Fed. 998.

CHAPTER XIV.

OF DAMAGES IN COLLISION CASES.

- 144. Recovery Based on Negligence.
- 145. Inevitable Accident or Inscrutable Fault.
- 146. One Solely in Fault.
- 147. Both in Fault.
- 148. Rights of Third Party where Both in Fault.
- 149. Contribution between Colliding Vessels—Enforcement in Suit against Both.
- 150. Enforcement by Bringing in Vessel not Party to Suit.
- 151. Enforcement by Independent Suit.
- 152. Measure of Damages.
- 153. When Loss Total.
- 154. When Loss Partial.
- 155. Remoteness of Damages—Subsequent Storm.
- 156. Doctrine of Error in Extremis.

RECOVERY BASED ON NEGLIGENCE.

144. Negligence is an essential to recovery of damages in collision cases.

The mere happening of a collision does not give rise to a right of action for damages resulting therefrom except in those cases where, under the navigation rules, one vessel is presumed to be in fault until she exonerates herself. Even in those cases the right of recovery is based, not upon the mere collision, but upon the presumption of negligence.

A collision may happen under any one of several circumstances. It may arise without fault, it may arise by the fault of either one of the two, or it may arise by the fault of both. The law, as administered in the admiralty courts, is well summarized by Lord Stowell in the case of *THE WOODROP-SIMS*.¹ In it he says:

§ 144. ¹ 2 Dod. 83.

"In the first place, it [collision] may happen without blame being imputable to either party; as, where the loss is occasioned by a storm, or other vis major. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame,—where there has been want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the innocent party would be entitled to an entire compensation from the other."

The question must be considered—First, as between the two ships; and, second, as respects third parties.

As between the owners of the two ships, it must be considered—First, where neither is in fault; second, where one alone is in fault; third, where both are in fault.

INEVITABLE ACCIDENT OR INSCRUTABLE FAULT.

145. Where neither vessel is in fault, or where the fault is inscrutable, neither can recover, and the loss rests where it falls.

Meaning of "Inevitable Accident."

A collision arising by inevitable accident comes under this clause.

An "inevitable accident," in the sense in which it is used in this connection, does not mean an accident unavoidable under any circumstances, but one which the party accused cannot prevent by the exercise of ordinary care, caution, and

maritime skill. This definition is taken from the case of *THE MARPESIA*.¹

In the case of *THE GRACE GIRDLER*,² the court says: "Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances; such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view,—the safety of life and property. Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen."

In *The Mabey* ³ the same idea is expressed thus: "Where the collision occurs exclusively from natural causes, and without any negligence or fault on the part of either party, the rule is that the loss must rest where it fell, as no one is responsible for an accident which was produced by causes over which human agency could exercise no control. Such a doctrine, however, can have no application to a case where negligence or fault is shown to have been committed on either side. Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together."

The reason for this is that it is unfair to hold any one responsible for a disaster produced by causes over which human skill and prudence can exercise no control.⁴

§ 145. ¹ L. R. 4 P. C. 212.

² 7 Wall. 196, 19 L. Ed. 113.

³ 14 Wall. 204, 20 L. Ed. 881.

⁴ *The Sunnyside*, 91 U. S. 208 210, 23 L. Ed. 302.

Under this class may be ranged those cases where accidents happen from the breakdown of machinery. For instance, in *The William Lindsay*,⁵ a vessel was tied to a regular mooring buoy in the harbor. During a storm the buoy broke loose, and in trying to put out an anchor the cable on the windlass became jammed. The court held that it was an inevitable accident.

In the case of *The Olympia*,⁶ a collision was caused by the breaking of a tiller rope from a latent defect, the proof showing that it had been carefully inspected. The court held that it was an inevitable accident.

On the other hand, in *The M. M. Caleb*,⁷ where a rudder chain broke from a defect which was discoverable by the exercise of reasonable care, the court held that it was negligence, and not an inevitable accident.

Collisions may occur from an inevitable accident, even though nothing breaks, and there is no vis major. In *The Java* ⁸ a small schooner, which came from behind a large school-ship, was struck by a steamer coming from the other side, and it appeared that the steamer could not have seen the sail vessel on account of the large ship. The court held that the accident was inevitable.

In the case of *The Transfer No. 3*,⁹ one boat was gradually overhauling another, and, when in a position where she could not stop in time to avoid collision, the machinery of the front boat broke down. The case was held one of inevitable accident.

⁵ L. R. 5 P. C. 338.

⁶ 9 C. C. A. 393, 61 Fed. 120.

⁷ 10 Blatchf. 467, Fed. Cas. No. 9,683.

⁸ 14 Wall. 189, 20 L. Ed. 834.

⁹ (D. C.) 91 Fed. 803.

ONE SOLELY IN FAULT.**146. Where one alone is in fault, that one alone is liable.**

This is so obvious that further discussion seems unnecessary.

BOTH IN FAULT.**147. Where both are in fault, the damages are equally divided, irrespective of the degree of fault.**

This is the settled law in England and America, and marks a sharp distinction between the common-law and admiralty courts. The distinction between the two forums is well summarized in the case of *CAYZER v. CARRON CO.*,¹ in which the court said:

“Now, upon that I think there is no difference between the rules of law and the rules of admiralty to this extent: That, where any one transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense,—what may be called the common law,—and thereby an accident happens, of which that transgression is the cause, he is to blame, and those who are injured by the accident, if they themselves are not parties causing the accident, may recover both in law and in admiralty. If the accident is a purely inevitable accident, not occasioned by the fault of either party, then common law and admiralty equally say that the loss shall lie where it falls,—each party shall bear his own loss. Where the cause of the accident is the fault of one party, and one party only, admiralty and common law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party

§ 147. 19 App. Cas. 873.

HUGHES, AD.—18

being guilty of blame which causes the accident, there is a difference between the rule of admiralty and the rule of common law. The rule of common law says, as each occasioned the accident, neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss, it shall be brought into hotchpotch, and divided between the two. Until the case of *Hay v. Le Neve*,* which has been referred to in the argument, there was a question in the admiralty court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the admiralty is that, if there is blame causing the accident on both sides, they are to divide the loss equally, just as the rule of law that, if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

The doctrine was adopted in America in the case of *THE CATHARINE*,² and has been followed in numerous subsequent cases, in all of which the supreme court treats the law on the subject as settled.³

In arriving at the apportionment of damages when the injuries to the two vessels are unequal, the doctrine is not that the losses of each vessel are treated as separate causes of action asserted as cross causes, but that it is one cause of action only, and the vessel most injured is entitled to a decree for half the difference between her loss and the other.⁴

If, for any reason, the limited liability act protects the

* 2 Shaw, 395.

² 17 How. 170, 15 L. Ed. 233.

³ See, as illustrations, *The Maria Martin*, 12 Wall. 31, 20 L. Ed. 251; *THE NORTH STAR*, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

⁴ *The Stoomvaart Maatschappij Nederland v. Navigation Co.*, 7 App. Cas. 795; *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. 1153, 30 L. Ed. 1095.

owners of one vessel from having to pay their moiety, the owners of the other vessel, if a third party has held them for more than their moiety, can recoup their loss, or plead it in set-off against the claim which the other vessel would otherwise have against them.⁵

An interesting illustration of this doctrine is the case of *The Chattahoochee*.⁶ There the shippers on one vessel, who were prevented by the provisions of the Harter act from recovering against their own vessel, proceeded against the other, and held the other for their loss. The vessel so held was permitted to plead this payment to the shipper in reduction of its liability to the other vessel, although thereby the other vessel was made indirectly responsible to the shipper, when it could not have been in a direct proceeding.

Origin of the Half-Damage Rule.

In examining the history of this half-damage rule, it is remarkable that the courts have adopted as a case for division of damages simply the case of mutual fault. This was not the origin of the rule. It may be traced at least as far back as the Laws of Oleron, article 14 of which provides:

"If a Vessel being moar'd lying at Anchor, be struck or grappled with another vessel under sail that is not very well steer'd, whereby the vessel at anchor is prejudic'd, as also wines, or other merchandize, in each of the said ships damnify'd. In this case the whole damage shall be in common, and be equally divided and appriz'd half by half; and the Master and Mariners of the vessel that struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did it not willingly or wilfully. The reason why this judgment was first given, being, that an old decay'd vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided."

⁵ *THE NORTH STAR*, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

⁶ 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801.

Under this provision the damages were divided not only as among the vessels, but the cargoes, and that, too, whether negligent or not, unless it was intentional.

Article 26 of the Laws of Wisbuy apportions the loss as between the two ships, but only in cases of accident, not in case of fault. On the other hand, title 7, §§ 10, 11, of the Ordonnance of Louis XIV., provides:

"X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbour.

"XI. But if the damage be occasioned by either of the masters, it shall be repaired by him."

Thus it is clear that the application of the rule in modern times is much narrower than it was in its origin.

An examination of these old codes reveals another very important fact in relation to it, and that is that it originated not in the law of torts, but in the law of average. It is under that head in the Ordonnance of Louis XIV., and the language of the others shows that it was treated as a contribution, and not as a mere liability on the ground of tort. The importance of this will appear in an early connection.

The doctrine of an equal division, no matter how the fault may compare, is so well settled by repeated decisions that it can hardly be considered open to question. There is one case in which the court refused to apply it. In the case of *THE VICTORY*,⁷ which was a collision between two English ships in Norfolk harbor, the district court decided the Victory alone at fault. An appeal was taken, and the case hotly contested in the circuit court of appeals on the main question of fault, no question as to the apportionment of damage being raised either in the record or briefs. The circuit court of appeals reversed the decision of the district court on the facts, and held both at fault, but the fault of

⁷ (D. C.) 63 Fed. 631; 15 C. C. A. 490, 68 Fed. 395.

the Victory to be the more flagrant of the two; and it apportioned the loss by making the owners of the Victory pay the full value of their vessel, and the owners of the Plymouthian merely pay the deficit sufficient to satisfy the cargo owners in full. A certiorari was applied for and obtained, and the case was argued in the supreme court, but that tribunal held the Victory alone at fault, and reversed the decision of the circuit court of appeals, so that the judgment of the latter on that question can hardly be considered a precedent on the question of the proper method of apportioning the damage.

The reason given by Dr. Lushington for an equal division, even where the fault is unequal,⁸ is the impossibility of apportioning accurately under such circumstances, and the uncertainty which it would introduce into litigation. No two judges might agree as to the exact proportions to be made, and it would be impossible for counsel in any collision case to advise with any degree of accuracy.

A modification of the old rule that contributory negligence defeats recovery has been recently attempted in some of the common-law courts by the introduction of the doctrine of comparative negligence, which is intended to allow a jury to apportion the damages according to the degree of fault. The uncertainties arising from it, and the increase of litigation attendant upon all uncertainty, have prevented its general adoption; and, even as to the few jurisdictions that have adopted it, the opinion of a distinguished text writer is that it has caused more confusion than benefit.⁹

This question has received a great deal of discussion in the past few years as an academic question among maritime writers, but, so far as the decisions are concerned, it is so well settled that only statutory enactment could change it.

⁸ *The Milan*, Lush. 388.

⁹ 2 Wood, R. R. (Ed. 1894) p. 1506, § 322b).

RIGHTS OF THIRD PARTY WHERE BOTH IN FAULT.

148. An innocent third party can recover against both vessels, but the form of his decree is not a general decree against both, but a decree for half against each, with a remedy over against the other in case the values are insufficient.

In England, in such cases, he can only recover half against each, and cannot make up his deficit against the other. Damages to third vessels, as well as between the two colliding ships, are brought into the estimate.¹

The form of this decree shows that the doctrine did not find its origin in the law of torts, although many judges speak of the two vessels as joint tortfeasors. The supreme court has sedulously guarded the form of this decree, even correcting it in some instances where the question was not a material one, as the values were sufficient. This form of decree was announced in the case of *The Washington*,² which was a case of a passenger on a ferryboat injured by the joint negligence of his boat and another vessel.

In the case of *The Alabama*,³ a vessel in tow was injured by the joint negligence of her tug and another vessel. The court gave the decree in the form above stated.

But this is a rule intended to do justice as between the wrongdoers, and will not be so applied as to deprive an innocent party of his right of full recovery. Hence, in *THE ATLAS*,⁴ a shipper on one of two vessels, both of which were in fault, proceeded against one vessel alone, and it was held that he was entitled to do so, and to recover his full

§ 148. ¹ *The Frankland* [1901] Prob. 161.

² 9 Wall. 513, 19 L. Ed. 787.

³ 92 U. S. 695, 23 L. Ed. 763.

⁴ 93 U. S. 392, 23 L. Ed. 863.

damage from that vessel. The question is thoroughly discussed in the opinion delivered by Mr. Justice Clifford, who seems to treat it as much on the basis of an average contribution as upon the basis of a tort; that average contribution, however, to be applied simply as between the two in fault.⁵

But the only deficit which the more valuable vessel must make up is a deficit in the value of the other vessel. Hence the third party, who is disabled by contract, or by any rule of law from proceeding against his own vessel, cannot recover the entire damages from the other vessel. In such case, if he proceeds against her alone, he can only recover half damages. For instance, under the Harter act, a shipper, who is prevented from holding his own vessel on the ground that the negligence causing the collision is one against which the vessel owner is protected by that act, must credit the other vessel with the half which he could otherwise recover from his own vessel.⁶

So, too, a member of a crew who is injured in a collision by the joint negligence of his own vessel and another, and who is prevented from proceeding against his own vessel by the fellow-servant doctrine, can only recover half from the other vessel.⁷

Thus the liability of the other vessel to make up any deficit must arise simply from the deficit in values, not from a deficit caused by a rule of law which affects the right of recovery of the injured party against his own vessel.

⁵ See, also, *The Sterling*, 106 U. S. 647, 1 Sup. Ct. 89, 27 L. Ed. 98; *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

⁶ *The Niagara* (D. C.) 77 Fed. 329; *Id.*, 28 C. C. A. 528, 84 Fed. 902; *The Rosedale* (D. C.) 88 Fed. 324; *Id.*, 35 C. C. A. 167, 92 Fed. 1021.

⁷ *The Queen* (D. C.) 40 Fed. 694; *The Job T. Wilson* (D. C.) 84 Fed. 204; *Jakobsen v. Springer*, 31 C. C. A. 315, 87 Fed. 948; *Id.*, 174 U. S. 802, 19 Sup. Ct. 885 (mem.).

**CONTRIBUTION BETWEEN COLLIDING VESSELS—
ENFORCEMENT IN SUIT AGAINST
BOTH.**

149. Where both are negligent, and have been brought before the court by a joint libel against both, this contribution will be enforced.

Under the cases already cited in a previous discussion, the form of the decree by which the third party is simply given a decree for half, with a contingent remedy over, is itself an enforcement of the right of contribution. At common law, in cases where no contribution existed as between wrongdoers, the decree was in solido against each, and, if the plaintiff levied his execution, and made his money out of one, that one could not compel the other to pay his part. These different forms of judgment or decree show the difference in the origin of the two doctrines at common law and in admiralty.

**SAME—ENFORCEMENT BY BRINGING IN VESSEL
NOT PARTY TO SUIT.**

150. Under the fifty-ninth admiralty rule, where the third party has proceeded against only one, that one can, by petition, compel the libellant to bring in the other vessel, if within reach of the process of the court.

This fifty-ninth rule in admiralty was promulgated on March 26, 1883.¹ It was the outgrowth of the decisions in reference to the form of decree, and was intended to prevent the injustice of leaving it to the caprice of the libellant

§ 150. ¹ 112 U. S. 743.

as to which of two colliding vessels he should hold. Just prior to its promulgation the case of *THE HUDSON* ² had been decided by District Judge Brown in the district court for the Southern district of New York. In that decision Judge Brown sustained a motion to bring in as defendant one of the two vessels that was not before the court, and in doing so rendered an opinion as to the advantages of the procedure and the relative rights of the two colliding vessels in such cases. His learned discussion, both of the English and American authorities, treats the matter rather as a matter of contribution or average than a matter of joint tort. Hence, where vessels are in the jurisdiction, the fifty-ninth rule permits a proceeding against the vessel not sued, which practically makes an average adjustment, so to speak, of the loss among the parties liable. Hence the right of contribution is settled at least in two classes of cases: First, those in which both vessels are sued, and it can be brought about by the form of decree or by recoupment; and, second, those in which only one vessel is sued, and the other vessel is within reach of the court's process.

SAME—ENFORCEMENT BY INDEPENDENT SUIT.

151. On the above principles, the right of contribution ought to exist between the two vessels by independent suit, but this cannot be considered as settled.

The above discussion still leaves open the case of suit against one vessel by the third party when the other vessel is not within the jurisdiction, and cannot be reached by process under the fifty-ninth rule. Suppose that in such a case the libellant gets a full decree against the vessel before the court, and compels payment, can that vessel institute an

² (D. C.) 15 Fed. 162.

independent suit against the other vessel, and compel it to pay its portion?

There are two district court decisions to the effect that such a remedy does not lie.

In the case of *The Argus*,¹ in the district court for the Eastern district of Pennsylvania, a dredge in tow of a tug collided with a steamer. The tug was operating the dredge under a contract between the owners by which the movements of the tug were controlled entirely by the tow. The owners of the dredge proceeded in New York against the steamer and tug for damages, but the tug was not served with process, and the dredge owners recovered their full damages from the steamer. Thereupon the steamer paid the damages, and libeled the tug in the district court of Pennsylvania to compel her to pay her share. The district court held that there was no direct remedy by the steamer against the tug; that, if she had any right at all, it must be by way of substitution to the lien which the libelant had asserted; and that in that special case the libelant was debarred from proceeding against the tug, as the management of the tug was solely in charge of his own officers. The opinion assumes, without discussion, that in the case of joint tortfeasors there is no recovery.

In the case of *The Mariska*,² in the district court for the Northern district of Illinois, it was held that admiralty rule 59 was not intended to give a subsequent proceeding of this sort, and that, independent of that rule, it was a case of joint tortfeasors, as to which there was no contribution.

Both these cases assume that if, at common law, a loss is caused by negligence, it is a case of joint tort, as to which there is no contribution.

Even at common law this assumption is erroneous. The rule that there is no contribution among joint tortfeasors,

§ 151. ¹ (D. C.) 71 Fed. 891.

² (D. C.) 100 Fed. 500.

according to the better authority, in the common-law courts only applies in cases where there was some intentional or moral wrong committed. It presupposes an evil intent, and as to such cases it was certainly a wise rule. But the better authority is that this doctrine does not apply where the injury was unintentional, but arose merely from negligence, or the operation of some rule of law.³

The subject has been considered in England recently in the case of *Palmer v. Wick & P. Steam Shipping Co.*⁴ In it the question is discussed mainly with reference to the law of Scotland, but in some of the opinions the old English authorities in which the doctrine originated are reviewed and distinguished.

It is considered also by Judge Brown in the case of *THE HUDSON*, *supra*, who arrived at the same conclusion with reference to the common-law doctrine as that above announced. But the weight of English authority is against contribution.⁵

In the case of *Armstrong Co. v. Clarion Co.*,⁶ a traveler was injured by the defective condition of a bridge maintainably by two counties. He sued one county, and recovered. Thereupon this county sued the other, and the court sustained its right to contribution, holding that the common-law rule gave contribution where the act that was being done was not unlawful, and that contribution arises from natural principles, and not from contract.

In the case of *The Gulf Stream*,⁷ where certain shippers had sued both vessels in a collision, one of the vessels compromised a good many of the claims at a considerable dis-

³ Pol. Torts, 171.

⁴ [1894] App. Cas. 318.

⁵ *The Frankland* [1901] Prob. 161, and cases cited.

⁶ 66 Pa. 218. On this subject of contribution at common law, see the note to the case of *Kirkwood v. Miller*, 5 Sneed, 455, 73 Am. Dec. 147.

⁷ (D. C.) 58 Fed. 604.

count, and yet attempted to set off their full value against the other vessel in a settlement between them. The court held that the parties occupied in the admiralty towards each other somewhat the relation of co-sureties, and that the other vessel was entitled to the benefit of these compromises. And in the case of *THE NORTH STAR*,⁸ previously cited, the opinion reviews the old admiralty codes on the subject, and shows that the doctrine of division of loss in admiralty cases arose out of the principles of general average, as has been heretofore discussed.

If these last three cases are right, it would seem to follow as an irresistible conclusion that an action for contribution ought to lie by one vessel against the other. The fact that there is no privity between them is immaterial; for general average and contribution do not depend upon questions of privity or contract, but upon principles of natural justice. Indeed, the very fact that they were not intentionally concurring in the act complained of is the reason why there should be a contribution, and why the common-law rule does not apply. Hence the reasoning of the Pennsylvania judge that the right could only be claimed derivatively through the libellant is counter to the original principles on which the doctrine was based. It has been seen that it arose from a desire of the admiralty courts to adjust equitably the relations between the two vessels themselves, and not through any consideration of the rights of a third party against them, for his rights are unaffected by the doctrine. And the other reason given in the two cases above cited, holding the adverse doctrine that there is no contribution against tortfeasors, is counter to the preponderance of authority, even at common law, which is to the effect that, where the act was not intentional, there may be a contribution between tortfeasors. Hence it is believed that, when the question arises untrammelled by other questions, and is

⁸ 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

fully presented, the courts will settle upon the doctrine that one of two vessel owners may proceed against the other to compel a contribution.

Whether this can be done in admiralty or not is a question of first impression, so far as known to the writer. It would seem on principle that such a suit would lie even in the admiralty. If the supreme court, by rule, can confer jurisdiction on an admiralty court to bring the other vessel in by petition, as is done by the fifty-ninth rule, that at least shows that the right is one of admiralty character, for a supreme court cannot, by rule, make a thing maritime which is not so by nature. It can only give a maritime remedy to a right maritime by nature. It has been seen in another connection that, where a salvor collects the entire salvage due, his co-salvors can sue him in admiralty to enforce an appointment or contribution,⁹ and this would seem to be a similar case. Admiralty has undoubted jurisdiction to compel contribution in cases of general average, and the doctrine now under discussion originated in the law of average.¹⁰ It is believed, therefore, that it will finally be settled as the law that contribution may be enforced in an admiralty proceeding, probably in rem, and certainly in personam, as between the owners of two colliding ships where one had been compelled to pay more than his share. It seems a necessary corollary from the doctrine that a decree is for half against each with a remedy over, thus making it a case where one is necessarily surety for the other in case of a deficit.¹¹

⁹ Ante, p. 142.

¹⁰ Ante, p. 47.

¹¹ Since the above was written, *The Marliska* has been reversed, and an independent libel in rem for contribution sustained (C. C. A.) 107 Fed. 989. But the court places it on the ground of subrogation to libellant, rather than contribution between the two vessels.

MEASURE OF DAMAGES.

152. The damages assessable in collision cases are those which are the natural and proximate result of the collision.

This subject must be considered—First, in reference to the cases where the loss is total; second, in reference to the cases where the loss is partial; third, what damages are proximate or remote.

SAME—WHEN LOSS TOTAL.

153. If the loss is total, the amount recoverable by the vessel owner is the market value of the vessel at the time of the collision, if that is ascertainable, and her net freight for the voyage.¹

The net freight allowed in cases of total loss is simply the net freight for the voyage broken up. Profits on a future charter, not entered upon, are too remote, and are not recoverable.²

In the case of *The Kate*,³ the vessel was on her way to perform a charter party when she was lost. The court rather varied the general rule by permitting recovery of her value at the end of the voyage, and the profit under that charter party, as it had already been entered upon. On the other hand, in the case of *The Hamilton* ⁴ the value of the vessel

§ 153. ¹ *THE BALTIMORE*, 8 Wall. 377, 19 L. Ed. 463; *The Laura Lee* (D. C.) 24 Fed. 483; *Fabre v. Steamship Co.*, 3 C. C. A. 534, 53 Fed. 288; *THE UMBRIA*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053.

² *THE UMBRIA*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; *The Kate* [1899] Prob. 165.

³ [1899] Prob. 165.

⁴ (D. C.) 95 Fed. 844.

at the beginning of the voyage was allowed, and interest from that date, but not the profits of the charter party which she then had, though she had entered upon it.

In case of a total loss of cargo, the value recoverable is the value at place of shipment, with all expenses added; but, if the loss is only partial, the net values saved must be credited.⁵

The mere fact that a vessel is sunk does not necessarily make the loss a total one. The owner must at least make some effort to find out whether she can be saved or not, but, if he shows an unsuccessful effort to induce salvors to raise her, it at least shifts to the respondent the burden to show that the loss was total.⁶

SAME—WHEN LOSS PARTIAL.

154. In case of a partial loss, the amount recoverable is the cost of saving the vessel, the repair and expense bills caused by the collision, and a reasonable allowance for the loss of the use of the vessel while being repaired.

There is usually but little difficulty in settling the items for actual repairs. The fight generally turns on the amount that should be allowed for the loss of the vessel's use, or demurrage, as it is frequently, though inaccurately, called.

The sum to be allowed is the actual loss caused to the owner by being deprived of his vessel. This is a question of fact, and is often difficult of ascertainment.

The demurrage rate specified in a bill of lading or charter

⁵ *The Umbria*, 8 C. C. A. 194, 59 Fed. 489.

⁶ *The Normandie* (D. C.) 40 Fed. 590; *Id.* (D. C.) 43 Fed. 151; *The E. A. Hamill* (D. C.) 100 Fed. 509; *The Des Moines*, 154 U. S. 584, 14 Sup. Ct. 1168, 20 L. Ed. 821.

party is not the measure of damages, though it may be competent evidence.¹

If the vessel is actually under charter, the amount payable per day is strong evidence of her value.²

When, however, the vessel is being operated by her owner, the method of fixing the rate varies greatly.

In *The Potomac*,³ a vessel engaged in a particular business was allowed the daily average of her net profits for the season.

In such cases the rate differs from that in case of total loss, for under partial loss cases the future profits on a charter may be allowed.⁴

Where no charter rate can be fixed, the courts hold that one good way of fixing the damage is to take the vessel's average earnings about the time of the collision.⁵

A company which keeps a spare boat can still recover for the loss of use of their steamer, though the spare boat took its place.⁶

As these damages are allowed simply to make up to the owner any pecuniary loss to which he may be put by being deprived of the use of his vessel, it follows that no allowance for loss of time can be recovered in case of a vessel not operated for profit, but pleasure,—like a private yacht,—or of vessels not in operation.⁷

§ 154. ¹ *The Hermann*, 4 Blatchf. 441, Fed. Cas. No. 6,408.

² *The Margaret J. Sanford* (C. C.) 37 Fed. 148.

³ 105 U. S. 630, 26 L. Ed. 1194.

⁴ *The Argentino*, 14 App. Cas. 519; *THE UMBRIA*, 166 U. S. 421, 17 Sup. Ct. 610, 41 L. Ed. 1053.

⁵ *THE CONQUEROR*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; *The William H. Bailey* (D. C.) 103 Fed. 799.

⁶ *The Cayuga*, 14 Wall. 270, 20 L. Ed. 828; *The Mediana* [1899] Prob. 127; *Id.* [1900] App. Cas. 113.

⁷ *THE CONQUEROR*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; *The Saginaw* (D. C.) 95 Fed. 703; *The Wm. M. Hoag* (D. C.) 101 Fed. 846.

On the other hand, in the case of *The Greta Holme*,⁸ the trustees of a municipality which kept a steam dredge for their sole use were allowed to recover for the time lost by it in consequence of a collision damage, though they could not prove any direct pecuniary loss. They did prove, however, that the filling up during the dredge's absence from work entailed additional dredging afterwards.

Interest on the value from the date of collision in case of total loss, and on each item in case of partial loss, is usually allowed, though its allowance is a matter of judicial discretion.⁹

In estimating the cost of repairs, the fact that new repairs make the vessel more valuable than she was before, if these new repairs were necessary to restore her, does not cause any deduction. The rule of one-third off new for old, which has been adopted by the insurance companies, does not apply in collision cases.¹⁰

It is often a difficult question of fact how far the recovery may extend when the vessel is old, and it is necessary to put in a good deal of work on each side of the natural wound in order to make the repairs hold. As a rule, the cost of repairing adjacent parts is not recoverable, provided those adjacent parts were not in good condition. If the vessel is in good condition, and the injury is such that repairs to adjacent parts are also needed, it would seem that they would be recoverable.¹¹

⁸ [1897] App. Cas. 596.

⁹ *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751.

¹⁰ *THE BALTIMORE*, 8 Wall. 377, 19 L. Ed. 463.

¹¹ *The John R. Penrose* (D. C.) 86 Fed. 696; *The Providence*, 38 C. C. A. 670, 98 Fed. 133.

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RE MOTENESS OF DAMAGES—SUBSEQUENT STORM.

155. If a vessel partially injured is so crippled by a collision as to be lost in a subsequent storm, which she could otherwise have weathered, that is, in law, considered as proximately arising from the collision.

The damages recoverable, as in common-law cases, are only those proximately caused by the collision. This is often a difficult question, and the decisions are not always enlightening. For instance, in the common-law case of *Memphis & C. R. Co. v. Reeves*,¹ tobacco which did not go forward as fast as it might have done was caught in a flood, which it would otherwise have escaped. The court held that the proximate cause was the flood.

In *The Leland*,² a vessel injured in collision while making her way to port was caught in a storm, and, in consequence of her crippled condition, was totally wrecked. It was contended that the proximate cause of her main damage was the storm, but the court held that it was the collision, and that the vessel at fault was liable for the entire loss. In *The City of Lincoln*,³ the compass, charts, log, and log glass of a bark were lost in a collision. On making her way to port, she grounded on account of the lack of these requisites to navigation. The court held that the additional damage received in grounding was due proximately to the collision, and recoverable.⁴

§ 155. ¹ 10 Wall. 176, 19 L. Ed. 909.

² (D. C.) 19 Fed. 771.

³ 15 Prob. Div. 15.

⁴ See, also, *Boutin v. Rudd*, 27 C. C. A. 526, 82 Fed. 685; *The Onoko* (D. C.) 100 Fed. 477; *Id.* (C. C. A.) 107 Fed. 984.

SAME--DOCTRINE OF ERROR IN EXTREMIS.

156. If a vessel, by her negligence, places the other in a perilous situation, and the latter, in the excitement, takes the wrong course, the negligence of the first is considered the proximate cause.

This is known as the "doctrine of error in extremis," and applies, as is well known, to all cases of negligence. The reason is that it is not right to expect superhuman presence of mind, and therefore, if one vessel has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind.¹

This doctrine has been enunciated in many American cases. Illustrations may be found in the cases which hold that a steamer must not run so close to a sailing vessel as to cause her alarm and trepidation.²

It applies just as well, however, to steamers.³

But the vessel which appeals to this doctrine must show that she was not in fault herself. She cannot claim to be free from negligence at the last moment on account of excitement, if her previous maneuvers have brought about the critical situation.⁴

§ 156. ¹ *The Bywell Castle*, 4 Prob. Div. 219; *THE NICHOLS*, 7 Wall. 656, 19 L. Ed. 157; *The Maggie J. Smith*, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

² *The Carroll*, 8 Wall. 302, 19 L. Ed. 392; *THE LUCILLE*, 15 Wall. 676, 21 L. Ed. 247; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; ante, p. 243.

³ *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469.

⁴ *THE ELIZABETH JONES*, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812.

CHAPTER XV.

OF VESSEL OWNERSHIP INDEPENDENT OF THE LIMITED LIABILITY ACT.

- 157. Method by Which Title to Vessels may be Acquired or Transferred.
- 158. Relation of Vessel Owners Inter Sese.
- 159. Relation of Vessel Owners as Respects Third Parties.

METHOD BY WHICH TITLE TO VESSELS MAY BE ACQUIRED OR TRANSFERRED.

- 157. A bill of sale is necessary for an American registry, but not for the mere transfer of title.

A vessel is a mere piece of personal property, and sale accompanied by delivery will transfer the title as between vendor and vendee. Section 4170 of the Revised Statutes of the United States provides :

"Whenever any vessel, which has been registered, is, in whole or in part, sold or transferred to a citizen of the United States, or is altered in form or burden, by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, the vessel shall be registered anew, by her former name, according to the directions hereinbefore contained, otherwise she shall cease to be deemed a vessel of the United States. The former certificate of registry of such vessel shall be delivered up to the collector to whom application for such new registry is made, at the time that the same is made, to be by him transmitted to the register of the treasury, who shall cause the same to be canceled. In every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite, at length, the certificate ; otherwise the vessel shall be incapable of being so registered anew."

It is held, however, under this, that the only effect of not having the required bill of sale, or of having a bill of sale without the certificate set out in it, is to cause the vessel to forfeit its rights to American registry.¹

In order to make this title binding as against third parties, it must be recorded in the custom house. Section 4192 of the United States Revised Statutes provides:

"No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or materials necessary to repair or enable her to prosecute her voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section."

If it is recorded according to this section, it is binding as to third parties, even though not indexed.²

This statute has been held to be constitutional by the United States supreme court.³

The place where the vessel is registered or enrolled is regulated by section 4141 of the Revised Statutes, which says:

"Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection-district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

§ 157. ¹ *The Amelle*, 6 Wall. 18, 18 L. Ed. 806; *De Wolf v. Har-rls*, 4 Mason, 515, Fed. Cas. No. 4221.

² *The W. B. Cole* (C. C.) 49 Fed. 587; *Id.*, 8 C. C. A. 78, 59 Fed. 182.

³ *WHITE'S BANK v. SMITH*, 7 Wall. 646, 19 L. Ed. 211.

These statutes, above quoted, which in terms apply to registered vessels, are made to apply to enrolled vessels by section 4312 of the Revised Statutes, which says:

"In order for the enrollment of any vessel, she shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel; and the same powers and duties are conferred and imposed upon all officers respectively, and the same proceedings shall be had, in enrollment of vessels, as are prescribed for similar cases in registering; and vessels enrolled, with the masters or owners thereof, shall be subject to the same requirements as are prescribed for registered vessels."

These bills of sale are required not only to be recorded, but they must set out exactly the interest of each person selling and each person purchasing.⁴

RELATION OF VESSEL OWNERS INTER SESE.

158. Part owners of a vessel, in the absence of special agreement, are tenants in common, not partners.

The presumption is in favor of a tenancy in common and against a partnership, though the latter may, of course, exist by special agreement. This has been settled law, both in England and America, for a long time.¹

The mere fact that a vessel is run on shares does not constitute the part owners a partnership.²

Part owners have no lien as against each other in case one pays more than his share of the expenses or debts, even

⁴ Sections 4192-4196.

§ 158. ¹ *The Sylph*, Fed. Cas. No. 1791; *Revens v. Lewis*, 2 Paine, 202, Fed. Cas. No. 11,711; *SPEDDEN v. KOENIG*, 24 C. C. A. 189, 78 Fed. 504.

² *The Daniel Kaine* (D. C.) 35 Fed. 785.

though the one so paying may be the ship's husband. This question was long a subject of debate in the courts, but the above may be considered as practically the settled doctrine now.³

In such case, however, when he has made necessary advances for the common benefit, under express or implied authority to do so, he may compel contribution from the owners for such advances; but this is a mere matter of accounts, and there is no jurisdiction in admiralty to maintain such a suit.⁴

The complete separation of vessel and owner in admiralty is forcibly illustrated by the fact that a part owner, who happens to be engaged in the business of furnishing repairs or supplies to vessels, may libel his vessel for such repairs and supplies so furnished, and may assert a lien against his other part owners or their assignee, but not to the detriment of creditors of the vessel itself. This doctrine must be carefully distinguished from the doctrine announced in the last paragraph. For a mere balance of accounts there is no right of action in admiralty, but, if a part owner of a vessel happens to keep a machine shop, and does work upon the vessel on the credit of the vessel, there is no reason why he should not be allowed to libel the vessel, and to assert such a maritime cause of action against his other part owners. But, when the vessel comes to be sold, if there are other creditors, it would be inequitable to allow the part owner, who himself may be personally bound, to assert a lien against his own creditors; and therefore the doctrine is limited to an assertion of it in subordination to the claims of the other creditors on the boat.⁵

³ *THE LARCH*, 2 Curt. 427, Fed. Cas. No. 8,085; *The Daniel Kaine* (D. C.) 35 Fed. 785.

⁴ *THE LARCH*, 2 Curt. 427, Fed. Cas. No. 8,085; *The Orleans*, 11 Pet. 175, 9 L. Ed. 677.

⁵ *THE CHARLES HEMJE*, 5 Hughes, 359, Fed. Cas. No. 11,047a;

There is nothing in the mere relation of part owners which makes one an agent for the other any more than there is in the relation of tenants in common. Hence one part owner, in the absence of some authority, express or implied, cannot bind the other part owner for the debts of the vessel. If cases exist in which the other part owner has been held bound, it will be found that there was some course of dealing or other circumstance tending to show express or implied authority.⁶

Disputes often arise between part owners as to the method of using their vessel. If they cannot agree, the majority owner can take the vessel, and use her, and in such case he will be entitled to the profits of the voyage, but the part owner may require him to give security for the protection of his interest in the vessel against loss, and admiralty has jurisdiction of a libel to compel the giving of such security.⁷

In such case a minority owner who is protected by such a bond, and who has refused to join in the voyage, cannot claim a share in its profits, as he has had none of the risk.⁸

In cases of disagreement the majority owner has the right to the use of the vessel, subject to the right of the minority to require bond; but, if the majority will not use the vessel at all, then the minority can use her on giving a similar bond to the majority. The reason of this is the principle of public policy that vessels should be used, and, while the majority in case of difference as to the precise voyage or the

The West Friesland, Swab. 454; *Learned v. Brown*, 36 C. C. A. 524, 94 Fed. 876.

⁶ *Brodie v. Howard*, 17 C. B. (84 E. C. L.) 109; *FRAZER v. CUTHBERTSON*, 6 Q. B. Div. 93.

⁷ *Coyne v. Caples* (D. C.) 8 Fed. 638; *The Betsina*, Fed. Cas. No. 14,236.

⁸ *The Marengo*, 1 Low. 52, Fed. Cas. No. 9,065; *Head v. Manufacturing Co.*, 113 U. S. 9, 5 Sup. Ct. 447, 28 L. Ed. 889.

precise method of use can control, they cannot control it so far as to require the vessel to be laid up.⁹

Although admiralty does not have jurisdiction to decree a sale of a vessel for mere purpose of partition where the interests in the vessel are unequal,—for in that case the majority can rule,—yet, if the interests are equal, and the equal interests disagree as to the method of employment of the vessel, then in that case neither can compel the other to give way, and admiralty has jurisdiction to decree a sale of the vessel.¹⁰

On the same principle that the majority rules, a majority may remove the master of the vessel at any time, even without cause, and even though he is part owner; but, if they remove him prior to the time which they had agreed to keep him, or in any way break their contract with him, of course they are liable to an action for damages. Their power of removal, however, seems clear, except when there is a written agreement to the contrary. On this subject section 4250 of the Revised Statutes says:

“Any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession, nor in any case where a master has possession as part owner, obtained before the ninth day of April, eighteen hundred and seventy-two.”¹¹

⁹ The *Betsina*, Fed. Cas. No. 14,236; The *Orleans*, 11 Pet. 175, 9 L. Ed. 677.

¹⁰ The *Ocean Belle*, 6 Ben. 253, Fed. Cas. No. 10,402; The *Betsina*, Fed. Cas. No. 14,236; *Coyne v. Caples* (D. C.) 8 Fed. 638; *Head v. Manufacturing Co.*, 113 U. S. 9, 23, 5 Sup. Ct. 447, 28 L. Ed. 889.

¹¹ The *Lizzie Merry*, 10 Ben. 140, Fed. Cas. No. 8,423; *Montgomery v. Wharton*, Fed. Cas. No. 9,737; *Same v. Henry*, 1 Dall. 49, 1 L. Ed. 22, 1 Am. Dec. 223; The *Eliza B. Emory* (C. C.) 4 Fed. 342.

In disputes with vessel owners admiralty takes cognizance only of legal titles, not of equitable.¹²

RELATION OF VESSEL OWNERS AS RESPECTS THIRD PARTIES.

159. Vessel owners are liable in solido for the debts or torts of the vessel incurred in the natural course of business by parties holding the relation of agent to such vessel owners.

This also is a long-settled principle of English and American law.¹

The parties who are usually the agents of the vessel are the master and the managing owner. These are frequently combined in the same person, and their powers are substantially the same. They may bind the owners for debts in the usual and natural employment of the vessel.

A clear statement of the powers of the ship's managing owner (which is practically another term for the ship's husband) is set out in volume 1, § 428, of Bell's Commentaries, which enumerates them as follows, and also the limitation on his powers:

"(1) To see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a seaworthy ship. (2) To have a proper master, mate, and crew for the ship, so that in this respect it shall be seaworthy. (3) To see to the due furnishing of provisions and stores, according to the necessities of the voyage. (4) To see to the regularity of all the clearances from the custom house, and the regularity of the registry. (5)

¹² The Eclipse, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269; The Robert R. Kirkland (D. C.) 92 Fed. 407.

§ 159. ¹ Thompson v. Finden, 4 Car. & P. 158, 19 E. C. L. 320; The Nestor, 1 Sumn. 73, Fed. Cas. No. 10,126; The Pilot, 2 Wall. Jr. 592, Fed. Cas. No. 5,199.

To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. (6) To enter into proper charter parties, or engage the vessel for general freight, under the usual conditions; and to settle for freight and adjust average with the merchant. (7) To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters, and to keep regular books of the ship."

Mr. Bell in treating of the limitations of the powers of a ship's husband, says:

"(1) That, without special powers, he cannot borrow money generally for the use of the ship, though he may settle the accounts of the creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them. (2) That, although he may, in the general case, levy the freight, which is, by the bill of lading, payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight, and give up the possession and lien over the cargo, unless it has been so settled by charter party, or unless he has special authority to give such indulgence. (3) That, under general authority as ship's husband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority. (4) That, as the power of the master to enter into contracts of affreightment is superseded in the port of the owners, so is it by the presence of the ship's husband, or the knowledge of the contracting parties that a ship's husband has been appointed."

Accordingly, it has been held that his powers do not extend so far as to permit him to bind the owners for the cargo purchased for the vessel, that not being considered as a necessity in the course of business.²

It is also well settled that the managing owner cannot bind the others in the home port unless express authority be

² The Ole Oleson (C. C.) 20 Fed. 384.

shown, for the basis of his power is the necessity of the vessel, and in the home port the owners can easily be consulted.³

Nor can he bind minority owners who have dissented from the use of the vessel for that particular voyage, for, as they cannot, in such case, share in the profits, it would be inequitable to expect them to bear the costs.⁴

The debts for which part owners may be bound by their agents are simply those things included in the term "necessaries." In another connection the question as to what constitutes "necessaries" which a captain may order for his vessel has been discussed, and the same test applies here. Reference is made to that discussion.⁵

The owners are liable not only for contract debts, but also for the torts of the master in the line of his duty, not for those outside the line of his duty. For instance, in *The Waldo* ⁶ the owners were held liable for injury to goods on a vessel while in transit, but not for damages received by their sale and disposition after they had been taken from the vessel; the master, as to these latter transactions, being considered the agent of the shippers, and not of the vessel owners.

The mere fact that a person appears on the papers of the vessel as owner does not make him liable. As seen above, he is not liable if he has expressly dissented from the voyage. In addition, if the bill of sale or title which he holds is a mere security, as a mortgage in disguise, and he has not the possession of the vessel, he is not liable. The question reduces itself to one of agency. In such case, as he has not

³ *SPEDDEN v. KOENIG*, 24 C. C. A. 189, 78 Fed. 504; *Woodall v. Dempsey* (D. C.) 100 Fed. 653; *Besse v. Hecht* (D. C.) 85 Fed. 677; *Helme v. Smith*, 7 Bing. 709, 20 E. C. L. 300.

⁴ *FRAZER v. CUTHBERTSON*, 6 Q. B. Div. 93; *The Vindobala*, 13 Prob. Div. 42; *Id.*, 14 Prob. Div. 50.

⁵ *Ante*, pp. 96, 97.

⁶ *The Waldo*, 2 Ware, 165, Fed. Cas. No. 17,056. See, also, *Taylor v. Brigham*, 3 Woods, 377, Fed. Cas. No. 13,781; *ante*, p. 192, § 106, note 1.

possession, he has not the power of appointment or control, and the parties operating the vessel are not his agents. Even if the vessel is run on shares by the master, that does not constitute him their agent.⁷

⁷ *Myers v. Willis*, 17 C. B. (84 E. C. L.) 77; *Webb v. Peirce*, 1 Curt. 104, Fed. Cas. No. 17,320; *Davidson v. Baldwin*, 24 C. C. A. 453, 79 Fed. 95.

CHAPTER XVI.

OF THE RIGHTS AND LIABILITIES OF OWNERS AS AFFECTED BY THE LIMITED LIABILITY ACT.

- 160. History of Limitation of Liability in General.
- 161. History and Policy of Federal Legislation.
- 162. By Whom Limitation of Liability may be Claimed.
- 163. Against what Liabilities Limitation may be Claimed.
- 164. Privity or Knowledge of Owner.
- 165. The Voyage as the Unit.
- 166. Extent of Liability of Part Owners.
- 167. Measure of Liability—Time of Estimating Values.
- 168. Prior Liens.
- 169. Damages Recovered from Other Vessel.
- 170. Freight.
- 171. Salvage and Insurance.
- 172. Procedure—Time for Taking Advantage of Statute.
- 173. Defense to Suit against Owner, or Independent Proceeding.
- 174. Method of Distribution.

HISTORY OF LIMITATION OF LIABILITY IN GENERAL.

160. The limitation of owner's liability is an outgrowth of the modern maritime law and codes.

Under the ancient civil law the owners were bound in *solido* for the liabilities of the ship arising out of contract, and in proportion to their respective interests for liabilities arising out of tort. This, however, merely settled the question of proportion as between the owners, but not the question of the extent of their liability. There seems to have been no limit on this as respects the value of the vessel. But the importance of encouraging maritime adventures, especially in the Middle Ages, when that was almost the only method of communication among nations, led to the gradual

adoption, among the maritime continental codes, of provisions limiting the liability of the owners to their respective interests in the ship. The greater frequency of maritime disasters in those days of frail craft emphasized the need of such a provision. Among others, we find these carried into the famous marine Ordonnance of Louis XIV., one provision of which is that the owners of a ship shall be answerable for the deeds of the master, but shall be discharged, abandoning their ship and freight.¹

In the last century this policy was partially adopted in England, though their act of limited liability was then, and still is, much less favorable to the vessel owner than most of the other acts.

The history of the development of this principle of modern maritime law is well summarized by Judge Ware in the case of *THE REBECCA*,² decided long before there was any federal statute on the subject.

HISTORY AND POLICY OF FEDERAL LEGISLATION.

161. The federal statutes are sections 4282-4289, Rev. St., Act June 26, 1884,¹ and Act June 19, 1886.² They are designed to encourage shipping by extending all possible protection to vessel owners.

In one sense the Harter act is an act limiting the liability of owners. This, however, regulates not so much the question of their liability in amount as the question whether they are responsible at all or not. But the acts immediately in view in the principal connection are rather those limiting the amount of their liability where some liability undoubtedly

§ 160. 130 Fed. Cas. 1,206.

² 1 Ware (188) 187, Fed. Cas. No. 11,619.

§ 161. 123 Stat. 57.

² 24 Stat. 80.

ly exists, and not the acts defining whether or not they are liable at all.

The first act above mentioned, now contained in sections 4282-4289 of the Revised Statutes, was passed on March 3, 1851, and is very similar to the British statute, although in many respects the act itself and the construction placed upon it by the courts is more liberal to the vessel owner.

Policy of the Act.

The policy of these acts is well explained by Mr. Justice Bradley in the case of *NORWICH & N. Y. TRANSP. CO. v. WRIGHT*,³ a leading case on the subject of limitation of liability. In it he says:

"The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in shipbuilding quite as much as in any of these enterprises. And, if there exist good reasons for exempting innocent ship-owners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, pre-

³ 13 Wall. 104, 20 L. Ed. 585.

cisely the same reasons exist for exempting them to the same extent from personal liability in cases of collision. In the one case as in the other, their property is in the hands of agents whom they are obliged to employ."

Liability for Fires—"Design or Neglect."

The first section of this act * does (contrary to the remaining portion of it) define certain circumstances under which the question of the responsibility of the vessel owner is involved, rather than the question of its extent. It provides, in substance, that there shall be no liability at all for a fire unless the fire is caused by the design or neglect of the owner. This, therefore, furnishes a complete defense to any liability, and not, as the remainder of the act, a method of surrendering an interest in the vessel itself as a means of limiting the liability.

The meaning of these words "design or neglect" came before the court in the case of *Walker v. Western Transp. Co.*,⁴ and the construction placed upon them by the courts is, in substance, that the owners are exempted, though there might be some design or neglect of their agents or employés, provided the vessel owner was not guilty of any personal design or neglect. In the opinion of the court Mr. Justice Miller says:

"It is quite evident that the statute intended to modify the shipowner's common-law liability, for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

"By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made. The exception is of cases where the fire can be charged to the owner's design or the owner's neglect.

* Rev. St. § 4282.

⁴ 3 Wall. 150, 18 L. Ed. 172.

"When we consider that the object of the act is to limit the liability of owners of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners. * * * We are, therefore, of opinion that, in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel, in which he does not participate personally."

The later case of *The Strathdon*⁵ involved an injury to the cargo from a heated flue in the ship. It appeared that the ship had been built by reputable builders. District Judge Thomas, in delivering the opinion of the court, discussed these words as follows:

"Hence the shipowners are not liable for injury to the cargo by fire, unless the cargo owner prove by a preponderance of evidence that the fire was caused by the design or neglect of the shipowners touching some duty that was imposed on them personally. A strained meaning should not be given to the words 'design or neglect.' The word 'design' contemplates a causative act or omission, done or suffered willfully or knowingly by the shipowner. It involves an intention to cause the fire, or to suffer it to be caused by another. The culpability is in the nature of a trespass. It is not understood that there is any claim that the fire in question was caused by such design of the shipowners. The word 'neglect' has an opposite meaning. Negligence involves the absence of willful injury, and is an unintended breach of duty, resulting in injury to the property or person of another. Were the shipowners guilty of such breach of duty? The duty was to use due care (and

⁵ (D. C.) 89 Fed. 374.

it may be assumed that a high degree of care would be required) to furnish a donkey boiler, if one were furnished at all, so related to the other parts of the ship that the cargo carried in the ship would not be fired, directly or indirectly, by the action of such a boiler, at least when properly used. What should suitably prudent proposed shipowners do to fulfill this duty? If they were not competent shipbuilders, they should engage persons of proper skill and carefulness, and delegate to them the performance of the duty. If the duty could not be delegated so as to exempt them from liability, yet the care and skill of the builders would inure to the benefit of the shipowners. * * * If, now, the shipowner has employed such reputable constructors, and if the use of the completed ship for several years justify the propriety of its arrangement and precaution against fire, and if very skilled men pronounce that the work accords with the existing knowledge of their profession, and if no man be forthcoming to declare otherwise, why should the shipowners be held to have failed in skill or diligence? Their care and skill should be equal to the prevailing knowledge of the mechanism which they undertake to construct and use, and to that standard they have attained. If there was any higher skill or ability existing at any time before the fire, evidence of it should have been given. In the absence of such evidence, and in view of the ample proof that what was known on the subject was employed in the construction of the donkey boiler and flue, the shipowners must be considered suitably diligent. It results that they are not liable for the injury to the cargo resulting from the fire."

Under this first section exempting the ship from entire liability, it has been held, in considering the peculiar phraseology of the section itself, that it only applied to fire on the ship, or to fires originating off the ship, and then communicating to the ship, and damaging goods on the ship. If the injury was received to goods on the wharf, or a wharf-

boat alongside of the ship, there would not be any exemption from liability under the terms of this first section.⁶

At the same time, an injury by fire, even though not on the ship, can be set up in partial exemption under section 4283; as injuries by fire occurring without the privity or knowledge of owners come under the terms of that section.⁷

Hence, as to injuries by fire, the question of exemption may arise in two ways: First, if it occurred on board the ship without any personal design or neglect of the shipowner, complete exemption from liability can be pleaded; second, if it occurs in such way as to render the ship or the shipowner liable under a proceeding in the admiralty, whether that proceeding is actually taken in the admiralty or in the state court, the owner may plead partial exemption by surrendering the vessel and freight under the terms of section 4283.

Exemption from Contract Liability by Act of June 26, 1884.

The act of 1851 remained substantially as originally drafted, with the exception of two slight amendments (which are embodied in the text in the last edition of the Revised Statutes), until 1884.

But section 18 of the act of June 26, 1884, very much extended its provisions. This section was not, in terms, an amendment of the act of 1851. This first act had only applied to cases *ex delicto*. By the new act the owners were allowed to limit their liability to their proportionate interests in the vessel against contractual obligations incurred by a master or part owner. But this was only to such debts as they would become liable for on account of their ownership in the vessel, and did not apply to personal contracts of their own.

⁶ *The Egypt* (D. C.) 25 Fed. 320; *The City of Clarksville* (D. C.) 94 Fed. 201.

⁷ *PROVIDENCE & N. Y. S. S. CO. v. MANUFACTURING CO.*, 100 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038.

The difference between the two acts is explained in the case of *The Annie Faxon*,⁸ where the court says:

"We fail to find in the language of the eighteenth section of the act of June 26, 1884, a purpose to repeal the provisions of any pre-existing statute. While its terms are vague, it would appear that the sole object of the act was to fix the liability of the shipowners among themselves, and extend their right to limit their liability under the provisions of section 4283 to all cases of debt and liability under contract obligations made on account of the ship, with the exception of wages due employés. In *Chappell v. Bradshaw* (C. C.) 35 Fed. 923, the court construed it thus: 'There are no words in it which signify that it was intended to be a repealing statute. It appears to be another section, intended to take its place at the end of the act of 1851, as that act is given in the Revised Statutes. It is another section, extending the exemption of shipowners to all or any debts or liabilities of the ship, except seamen's wages and liabilities incurred before the passage of the act of 1884. Where a subsequent statute can be so construed as not to bring it in direct conflict with an antecedent law, it will not be held by the courts to repeal the former statute. Repeals by implication are seldom allowed, and to do so in this instance would be to do violence to the intention of congress, which appears to have been to extend the act of 1851 to exempt shipowners from liabilities not embraced in this act.' In *Gokey v. Fort* (D. C.) 44 Fed. 364, Brown, J., said: 'I think the act of 1884 is doubtless to be treated as in *pari materia* with the act of 1851 (Rev. St. §§ 4233-4285), and designed to extend the act of 1851 to cases of the master's acts or contracts, and thus to bring our law into harmony with the general maritime law on this subject.'"

Amendment of June 19, 1886—Constitutionality.

The act of June 19, 1886, was, in terms, an amendment of the act of 1851. The original act had debarred from its

⁸ 21 Q. C. A. 366, 75 Fed. 312.

benefits the owners of any canal boat, barge, or lighter, or any vessel used in rivers or inland navigation. There had been some discussion as to the meaning of "inland navigation" under this law, and it had been held, among others, that the exception did not apply to the Great Lakes.⁹

The question of the constitutionality of these acts has been considered in two notable cases. In the case of *Lord v. Goodall, N. & P. S. S. Co.*,¹⁰ the constitutionality of the act was upheld under the commerce clause of the constitution; that being a case of a vessel which navigated the high seas between ports of the same state. But afterwards the question as to the validity of the law in relation to vessels engaged solely in inland navigation came before the court, and the constitutionality of the law was sustained under the admiralty clause of the constitution, independent of the commerce clause. The reasoning of the court is, in substance, that the doctrine of limited liability is a well-established part of the general maritime law, and that, while that general law has no place in our jurisprudence until adopted, the right to adopt it at any time is clearly vested in congress. This question has been discussed fully in the chapter relating to injuries resulting in death, to which reference is made.¹¹

BY WHOM LIMITATION OF LIABILITY MAY BE CLAIMED.

162. The benefit of the act may be claimed by any part owner who had no privity or knowledge of the fault which gave rise to the liability.

Where a vessel is owned by several parties, and incurs liabilities, even though those liabilities are incurred by the

⁹ *Craig v. Insurance Co.*, 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

¹⁰ 4 Sawy. 292, Fed. Cas. No. 8,506; *Id.*, 102 U. S. 541, 26 L. Ed. 224.

¹¹ *Ante*, pp. 204-207.

master or managing owner, the other part owners, who had no privity or knowledge of it, can claim the benefit of the act, and limit their responsibility to the value of their several part interests. This applies to debts and liabilities contracted in the usual course of trade of a vessel, as well as to torts.¹

Its benefits may be claimed by the underwriter to whom a vessel has been abandoned, and against any liability incurred while the vessel is in charge of their agent.²

As the act is part of the general maritime law, it may be claimed by a foreigner.³

AGAINST WHAT LIABILITIES LIMITATION MAY BE CLAIMED.

163. The liabilities against which the exemption given by the act may be asserted are such liabilities as would be cognizable in the admiralty court by suit against the vessel or against the owners in personam, even though in the special case they are being asserted in a common-law court.

The leading decision laying this down as the test is the case of *EX PARTE PHENIX INS. CO.*¹ In that case a fire had communicated from the vessel to the shore, and had done damage on the shore. It was contended that the vessel owner could limit his liability against such a cause of action as this, and that it came within the language of the statute. The court, however, held that, as a cause of ac-

§ 162. ¹ *In re Leonard* (D. C.) 14 Fed. 53; *Warner v. Boyer* (D. C.) 74 Fed. 873; *The S. A. McCaulley* (D. C.) 99 Fed. 302; *Douse v. Sargent* (D. C.) 48 Fed. 605.

² *Craig v. Insurance Co.*, 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

³ *THE SCOTLAND*, 105 U. S. 24, 26 L. Ed. 1001.

§ 163. ¹ 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274.

tion originating on water, but consummate on land, could not be asserted in an admiralty court, the owner could not claim the benefit of the act, it being a part of the general maritime law, and resting mainly on that law for its validity.²

As examples of such causes of action, the defense has been sustained against fires on vessels,³ and may be pleaded not only against loss or damage to property, but also against personal injuries, including those resulting in death; and not only against those injured on the vessel itself which is setting up the exemption, but those also injured upon another vessel by the negligence of the vessel asserting the exemption.⁴

This includes injuries due to collision.⁵

In this respect the policy of the act differs strikingly from that of the Harter act. It has been seen⁶ that the Harter act is held to regulate only the relations between a shipper and his own ship, and not to affect any rights of action which parties on another ship injured by the offending ship may have.

On the other hand, this act enables the owner to defend himself not only against his own shippers or passengers, but against those on the other vessel as well. The reason for the difference of policy is, probably, that the Harter act works an entire exemption from all liability, whereas this act permits the injured party to subject the owner's interest

² See, also, *Goodrich Transp. Co. v. Gagnon* (C. C.) 36 Fed. 123.

³ Ante, pp. 305-308.

⁴ *BUTLER v. STEAMSHIP CO.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751; *The City of Columbus* (D. C.) 22 Fed. 460; *The Amsterdam* (D. C.) 23 Fed. 112; *Glaholm v. Barker*, L. R. 2 Eq. 598; *Id.*, 1 Ch. App. 223.

⁵ *NORWICH & N. Y. TRANSP. CO. v. WRIGHT*, 13 Wall. 104, 20 L. Ed. 585; *The Great Western*, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. Ed. 156.

⁶ Ante, p. 169.

in the vessel, and merely protects the owner from additional liability beyond the value of his vessel.

The act may be invoked even against unseaworthiness caused by negligent loading, which is another striking difference between it and the Harter act.⁷

It may be pleaded against any wrongful acts of the master; for example, his wrongful sale of the cargo.⁸

PRIVITY OR KNOWLEDGE OF OWNER.

164. In order for the owners to exonerate themselves, the negligent act must have been without their privity or knowledge. This means the personal privity or knowledge of the owners, and not the mere privity or knowledge of their agents, except in the case of a corporation, where the privity or knowledge of the president or other high officer above the grade of an employé is the privity or knowledge of the corporation, and would defeat the right of the corporation to the exemption.

The question what constitutes privity or knowledge is a nice one, and has been the subject of much discussion. It is clear, at the outset, that actual knowledge of the owners would prevent them from claiming the exemption.¹

Nor can it be claimed against liabilities which the owners have personally contracted; for instance, supplies ordered by them personally.²

⁷ THE COLIMA (D. C.) 82 Fed. 665.

⁸ The Giles Loring (D. C.) 48 Fed. 463.

§ 164. ¹ In re Meyer (D. C.) 74 Fed. 881.

² The Amos D. Carver (D. C.) 35 Fed. 695; McPhail v. Williams (D. C.) 41 Fed. 61; Gokey v. Fort (D. C.) 44 Fed. 364.

It can be claimed only against those liabilities incurred as owner, not against contracts outside of the regular functions of the vessel owner. For instance, it has been held that it could not be set up against a vessel owner's contract to insure the goods shipped.³

It may be set up even against defects which would be held to constitute unseaworthiness if those defects were not discoverable by the ordinary examination of an unskilled person. In the case of *Quinlan v. Pew* ⁴ the owners had chartered the vessel out to the master. There was a defect in the rigging at the time of the commencement of the voyage which the owners did not know, and which the master did know before she sailed. The owners had employed him to put the vessel in order, and he did not report this defect to them. In consequence of the defect, one of the crew was injured, and the owners attempted to limit their liability by appealing to this statute. This was contested on the ground that they ought to have known of this defect; that it was such a defect as affected the seaworthiness of the vessel, and that, therefore, they should be denied the exemption. The court, however, held that the knowledge of the agent employed by them to make these repairs, and their joint obligation to render the vessel seaworthy, did not make them privy to this defect, and therefore that they were entitled to limit their liability.

In the case of *The Warkworth*,⁵ which arose under the English statute, a collision was caused by a defect in the steering gear of the vessel. The owners had employed a man on shore to inspect the vessel; and, if he had done his duty, the defect could have been discovered. It was held that this fact did not prevent the owners from limiting their liability.

³ *Laverty v. Clausen* (D. C.) 40 Fed. 542.

⁴ 5 C. C. A. 438, 56 Fed. 111.

⁵ 9 Prob. Div. 20; *Id.*, 9 Prob. Div. 145.

In *Lord v. Goodall, N. & P. S. S. Co.*,⁶ Circuit Judge Sawyer thus discusses the meaning of the words "privity or knowledge":

"As used in the statute, the meaning of the words 'privity or knowledge' evidently is a personal participation of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions. *Hill Mfg. Co. v. Providence & N. Y. S. S. Co.*, 113 Mass. 499, 18 Am. Rep. 527. It is the duty of the owner, however, to provide the vessel with a competent master and a competent crew, and to see that the ship, when she sails, is in all respects seaworthy. He is bound to exercise the utmost care in these particulars,—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity, within the meaning of the act. * * * So, also, if the owner has exercised all proper care in making his ship seaworthy, and yet some secret defect exists, which could not be discovered by the exercise of such due care, and the loss occurs in consequence thereof, without any further knowledge or participation on his part, he is in like manner exonerated, for it cannot be with his 'privity or knowledge,' within the meaning of the act, or in any just sense; and the provision

⁶ 4 Sawy. 292, Fed. Cas. No. 8506. This case was taken to the supreme court, and was affirmed on the question of the constitutionality of the statute. See 102 U. S. 541, 26 L. Ed. 224. The merits do not seem to have come before the supreme court.

is that 'the liability of the owner * * * for any act, matter, or thing, loss, etc., * * * occasioned without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.' This language is broad, and takes away the quality of warranty implied by the common law against all losses except by the act of God and the public enemy. When the owner is a corporation, the privity or knowledge of the managing officers of the corporation must be regarded as the privity and knowledge of the corporation itself."

This construction of the words is rather harder on the owner than the case of *Quinlan v. Pew*, *supra*, but the latter is more in accord with the later authorities.

The question of the privity or knowledge of a corporation has been the subject of many interesting decisions. The result of these decisions may be stated in substance to be that knowledge of some defect (even amounting to unseaworthiness) by some agent or employé is not the knowledge of the corporation, so as to defeat its right to the exemption; but the knowledge of the president or other high officer of the corporation would be.

In *THE COLIMA*,⁷ the vessel was rendered unseaworthy by the method in which her master and crew loaded her, and it was contended that this defeated the corporation owner's right to the exemption. District Judge Brown, however, held that it did not. In his opinion he says:

"I think the petitioner, upon surrender of the freight (\$23,846.58), is entitled to the exemption provided by section 4283 of the Revised Statutes, as not being privy to the defects in loading, or in the management of the ship at sea, nor having knowledge of them. Privity and knowledge are chargeable upon a corporation when brought home to its principal officers, or to the superintendent, who is its rep-

⁷ (D. C.) 82 Fed. 665.

representative; and, if such privity or knowledge were here brought home to Mr. Schwerin, the petitioner's superintendent, they would be chargeable upon the corporation. But the privity or knowledge referred to in the statute is not that which arises out of the mere relation of principal and agent by legal construction. If it were, the statute would have nothing to operate upon, since the owner does not become liable at all except for the acts of himself or his agent. The object of this statute, however, was to abridge the liability of shipowners arising out of a merely constructive privity with their agent's acts, by introducing the rule of limited liability prevailing in the general maritime law, upon the terms prescribed in the statute, so far at least as respects damages for torts; while the act of 1884 extends this limitation to contracts also, except as to seamen's wages.

* * * The knowledge or privity that excludes the operation of the statute must, therefore, be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts or conditions, or through some kind of personal participation in them. If Mr. Schwerin, the superintendent, had been either charged personally with the duty of directing or managing the distribution of this cargo with reference to the stability of the ship, or had assumed that function, the company would perhaps have been 'privity' to any defects in loading arising from the negligence of workmen under his immediate direction and control, whether he had actual knowledge of their delinquencies or not; since it is the duty of the person in immediate charge and actual control to see and know that proper directions are carried out. However that may be, Mr. Schwerin had no such duty, and assumed no such function. That duty, as the evidence shows, was committed to a competent stevedore, who acted under the immediate direction of the master and first mate, or in conjunction with them. The master and mate were the proper persons to determine and insure

the necessary trim and stability of the ship, and are supposed to be specially qualified to do so. *Lawrence v. Min-turn*, 17 How. 100, 111, 116, 15 L. Ed. 58. Whatever mistakes or negligence may have occurred in that work, there is no evidence that Mr. Schwerin knew of them; nor would they naturally have come to his knowledge; and I do not see the least reason to doubt his testimony that he believed that the ship was properly loaded, and perfectly seaworthy. The deck load was no indication to the contrary, because deck loads were customary, and safe with proper loading below."

In *The Annie Faxon*,⁸ an injury happened from an explosion of the boiler. It appeared that the corporation owning the vessel had left the duty of inspecting this boiler to a competent marine engineer, and that the defect which caused the injury would not have been apparent to an unskilled person. It was held that the negligence of this employé to inspect the boiler properly was not such privity or knowledge of the corporation as defeated its right to the exemption. In the opinion Gilbert, J., says:

"We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, unless the defects were apparent, and of such a character as to be detected by the inspection of an unskilled person. The record fails to show that the defects were of this character. The testimony fairly sustains the finding of the court that the defects in the boiler were not patent, and that they could have been discovered only by applying the proper test after the repairs of June, 1893. The test was not applied, and in that omission is one of the elements of the negligence of the petitioners, as found by the court. When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of

⁸ 21 C. C. A. 366, 75 Fed. 312.

a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded of an inspector of a boiler. It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concerns injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert."

It was held, however, in this same case, that the requirement of section 4493 of the Revised Statutes, making exceptions in favor of passengers on vessels, was not affected by the limited liability act, it being an entirely different statute, which, when considered in *pari materia* with the limited liability act, might be considered as an exception to it.

In the case of *Craig v. Continental Ins. Co.*,⁹ the injury arose from the negligence of an employé of the insurance company to which the vessel had been abandoned. The employé was attempting to bring her to port in a disabled condition. The court held that his negligence was not the privity or knowledge of the insurance company, which owned her by virtue of the abandonment, and that they could claim the limitation of liability.

On the other hand, in the case of *The Republic*,¹⁰ a barge belonging to a corporation was being used for an excursion, and while in such use, with many passengers aboard, was injured by a thunderstorm of no extraordinary severity. The barge had been inspected by the president of the corporation, and its unsafe condition was apparent. The court held that his knowledge was the knowledge of the corporation, and that they could not plead the statute in defense under such circumstances.

⁹ 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886.

¹⁰ 9 C. C. A. 386, 61 Fed. 109.

THE VOYAGE AS THE UNIT.

165. The end of the voyage is the time as of which the exemption can be claimed, the voyage being taken as the unit. If the voyage is broken up by a disaster,—as, for example, when the vessel is totally lost,—that is taken as the time.

It can readily be understood that the act does not intend to permit the owners an exemption for an indefinite period prior to the accident. As the act of 1884 extended the right of exemption to debts as well as torts, the hardship of such a construction would be patent. Hence the courts have taken the voyage as the unit, and permitted the owner to protect himself simply against the liabilities of the voyage. This may be a very difficult test to apply in many cases, and, in fact, in the case of boats which make very short voyages, may very greatly curtail the benefit of the act to the owner; but that is well settled as the test.

In *THE CITY OF NORWICH*,¹ this was laid down as the rule by the United States supreme court. There the vessel was destroyed by an accident.

In the case of *The Great Western*,² the vessel had one accident, and, proceeding on her voyage, had a second accident, entirely disconnected with the first—the result of the second accident being the wreck of the vessel. The court held that the termination of the voyage was the second accident, and that the owners could limit their liability for everything up to that point on that voyage.³

§ 165. ¹ 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

² 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. Ed. 156.

³ See, also, *Gokey v. Fort* (D. C.) 44 Fed. 364; *The Geo. L. Garlick* (C. C. A.) 107 Fed. 542.

EXTENT OF LIABILITY OF PART OWNERS.

166. The part owners are liable each to the extent of their proportionate interest in the vessel, except that a part owner personally negligent cannot claim the exemption at all.¹

MEASURE OF LIABILITY—TIME OF ESTIMATING VALUES.

167. The value of the vessel and pending freight is taken just after the accident, or end of the voyage, if the voyage is not broken up by the accident.

This is laid down by the supreme court in the case of *THE SCOTLAND*,¹ and marks a striking difference between the American and English act. Our act fixes the value of the vessel just after the accident, so that, if she is totally lost, the liability of the owner is practically nothing. The English act, on the other hand, takes a tonnage valuation just before the accident, so that, in case of total loss, under the English act the owner must make up to the creditors of the vessel practically the value of the vessel uninjured.

In the case of *THE CITY OF NORWICH*,² it is settled as the law of this country that the value is taken as of the end of the voyage, if not lost, but at the accident if the vessel is totally lost, and the voyage thereby broken up. Hence, if a vessel is partially injured, and subsequently repaired, the owners can have the repairs taken into consideration, and receive credit for them in the valuation of the vessel.

§ 166. ¹ *Whitcomb v. Emerson* (D. C.) 50 Fed. 128; *The Giles Loring* (D. C.) 48 Fed. 463.

§ 167. ¹ 105 U. S. 24, 26 L. Ed. 1001.

² 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

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The voyage itself may be rather an indefinite expression. For instance, it has been held in the case of a vessel used during a fishing season that the entire fishing season ought to be treated as one voyage, and that, therefore, the owners must account for the entire season's earnings in order to obtain the benefit of the limitation.³

SAME—PRIOR LIENS.

168. The res must be surrendered clear of prior liens.

In fixing the value, the owner must account for the value of the res, clear of all liens or claims prior to the voyage.

The res, in the sense of this statute, may sometimes consist of more than one vessel. In *The Bordentown*,¹ several tugs belonging to the same owner were towing a large tow of many barges. After the towage commenced, one of the tugs was detached, but the two remaining tugs were guilty of an act of negligence, causing great loss. The court held that the owner, in order to claim the benefit of the statute, must surrender the two tugs that participated in the negligent act, but not the one which had been detached before the act occurred.

In the case of *The Columbia*,² a barge without means of propulsion was being towed by a tug, and a large quantity of freight was on the barge. When exemption was claimed against an accident, including large claims of personal injury, it was held that the owner was required to surrender both the tug and the barge.

As stated above, the owner must also surrender the vessel clear of prior liens. If this were not so, he might, by mortgaging the vessel to her value, practically withdraw all

³ *Whitcomb v. Emerson* (D. C.) 50 Fed. 128.

[§] 168. ¹ (D. C.) 40 Fed. 682.

² 19 C. C. A. 436, 73 Fed. 226.

funds from the creditors of the boat. Accordingly, in *The Leonard Richards*,³ the court says:

"The first question suggested by counsel for the owners of the tug is as to the proper construction to be put upon the words 'value of the interest of the owner,' as used in the limited liability act. The section of the act in point, or so much of it as is necessary to quote, is as follows: 'The liability of the owner of any vessel, * * * for any loss, damage, or injury by collision, * * * done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.' Rev. St. U. S. § 4283. It appears in this case that supplies to a large amount had been furnished to this tug, which were at the time of the collision unpaid for, and which, under the law, were liens upon the vessel; and the insistment of counsel was that although the tug had an apparent value of \$8,000, and had been appraised at that sum, yet the 'interest of the owner' in her ought not to be calculated upon that basis, but that from the appraised value of the vessel should be deducted the full amount of the debts and claims owed by the vessel, and the balance taken to be the true 'value of the interest' of the owner. In other words, that, while the stipulation filed, and upon which the tug was released from the custody of the officers and returned to her owner, was for \$8,000, yet when the time came for payment of the sum into court in compliance with its condition, to be distributed among libelants and claimants according to law, there should be first deducted therefrom a sum equal to the full amount of all debts due for supplies, repairs, etc., for which liens against the vessel could be enforced, and the balance only brought here as the true value of the owner's interest, to be distributed pro rata among the libelants. Without considering whether the own-

³ (D. C.) 41 Fed. 818. See, also, *Gokey v. Fort* (D. C.) 44 Fed. 364.

er is not, by his own act, estopped from raising this question now, after entering into a stipulation to pay the full amount of the appraised value of the tug if she be found in fault to the other libelants, and in consideration thereof receiving security from the law from all further or greater liability, I am clearly of opinion that the real value of the vessel in fault, without regard to liens upon her at the termination of her voyage, upon which she negligently caused the injury complained of, measures justly and equitably the value of the interest of the owner therein as contemplated by the limited liability act."

SAME—DAMAGES RECOVERED FROM OTHER VESSEL.

169. The owner must also surrender damages recovered from another vessel.

If the owner has proceeded against another vessel, and recovered damages for the injury to his vessel in the accident against which he is claiming liability, he must surrender these damages also, they being considered practically the representative of his vessel. This was held in the case of *O'Brien v. Miller*.¹ In delivering the opinion of the court, Mr. Justice White says:

"The clear purpose of congress was to require the ship-owner, in order to be able to claim the benefit of the limited liability act, to surrender to the creditors of the ship all rights of action which were directly representative of the ship and freight. Where a vessel has been wrongfully taken from the custody of her owners, or destroyed through the fault of another, there exists in the owner a right to require the restoration of his property, either in specie or by a money payment, as compensation for a failure to restore the property. Manifestly, if the option was afforded

§ 169. ¹ 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469.

the owner of the ship to receive back his property or its value, he could not, by electing to take its value, refuse to surrender the amount as a condition to obtaining the benefit of the act. * * * Indeed, that a right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself, was decided in this court in the case of *Sheppard v. Taylor*, 5 Pet. 675, 8 L. Ed. 269. * * * Mr. Justice Story, delivering the opinion of the court, said (page 710, 5 Pet., and page 282, 8 L. Ed.): 'If the ship had been specifically restored, there is no doubt that the seamen might have proceeded against it in the admiralty in a suit in rem for the whole compensation due to them. They have, by the maritime law, an indisputable lien to this extent. This lien is so sacred and indelible that it has on more than one occasion been expressly said that it adheres to the last plank of the ship. *Relf v. The Maria*, 1 Pet. Adm. 186, 195, note, Fed. Cas. No. 11,692; *The Sydney Cove*, 2 Dod. 13; *The Neptune*, 1 Hagg. Adm. 227, 239. And, in our opinion, there is no difference between the case of a restitution in specie of the ship itself and a restitution in value. The lien reattaches to the thing, and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lienholder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them.' Nor does the ruling in *THE CITY OF NORWICH*, supra, that the proceeds of an insurance policy need not be surrendered by the shipowner, conflict with the decision in *Sheppard v. Taylor*. The decision as to insurance was placed on the ground that the insurance was a distinct and collateral contract, which the shipowner was at liberty to make or not. On such question there was division of opinion among the writers on maritime law and in the various mari-

time codes. But, as shown by the full review of the authorities found in the opinion of the court and in the dissent in **THE CITY OF NORWICH**, all the maritime writers and codes accord in the conclusion that a surrender, under the right to limit liability, must be made of a sum received by the owner as the direct result of the loss of the ship, and which is the legal equivalent and substitute for the ship. We conclude that the owner who retains the sum of the damages which have been awarded him for the loss of his ship and freight has not surrendered 'the amount or value' (section 4283, Rev. St. U. S.) of his interest in the ship; that he has not given up the 'whole value of the vessel' (section 4284); that he has not transferred 'his interest in such vessel and freight' (section 4285). It follows that the shipowner, therefore, in the case before us, to the extent of the damages paid on account of the collision, was liable to the creditors of the ship, and the libelants, as such creditors, were entitled to collect their claim, it being less in amount than the sum of such proceeds."

SAME—FREIGHT.

170. Pending freight must be surrendered.

The owner is also required to surrender pending freight. This has been held to include demurrage, and prepaid fare of passengers.¹

If any freight has been earned or prepaid during the voyage, the owner must account for it; but, if the voyage is broken up, so that no freight is actually earned, then he cannot be made to pay it.²

§ 170. ¹ *The Giles Loring* (D. C.) 48 Fed. 463; *The Main*, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381.

² *THE CITY OF NORWICH*, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

The freight that is to be surrendered is the gross freight for the voyage.³

If the vessel owner is carrying his own goods, he must account for a fair freight for them.⁴

SAME—SALVAGE AND INSURANCE.

171. Salvage and insurance need not be surrendered.

But the owner does not have to account for salvage earned during the voyage.¹

And, if the owner has taken out insurance, he is not required to account for the insurance money collected by him; that being a collateral undertaking, and not an interest in the vessel. On this subject Mr. Justice Bradley says in *THE CITY OF NORWICH*:²

"The next question to be considered is whether the petitioners were bound to account for the insurance money received by them for the loss of the steamer, as a part of their interest in the same. The statute (section 4283) declares that the liability of the owner shall not exceed the amount or value of his interest in the vessel and her freight; and section 4285 declares that it shall be a sufficient compliance with the law if he shall transfer his interest in such vessel and freight, for the benefit of claimants, to a trustee. Is insurance an interest in the vessel or freight insured, within the meaning of the law? That is the precise question before us.

"It seems to us, at first view, that the learned justice who decided the case below was right in holding that the word 'interest' was intended to refer to the extent or amount of ownership which the party had in the vessel, such as his

³ *The Abble C. Stubbs* (D. C.) 28 Fed. 719.

⁴ *Allen v. Mackay*, 1 Spr. 219, Fed. Cas. No. 228.

§ 171. ¹ *In re Meyer* (D. C.) 74 Fed. 881.

² 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

aliquot share, if he was only a part owner, or his contingent interest, if that was the character of his ownership. He might be absolute owner of the whole ship, or he might own but a small fractional part of her, or he might have a temporary or contingent ownership of some kind, or to some extent. Whatever the extent or character of his ownership might be,—that is to say, whatever his interest in the ship might be,—the amount or value of that interest was to be the measure of his liability.

“This view is corroborated by reference to a rule of law which we suppose to be perfectly well settled, namely, that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guarantying him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property. That interest he has already, by virtue of his ownership. If it were not for a rule of public policy against wagers, requiring insurance to be for indemnity merely, he could just as well take out insurance on another’s property as on his own; and it is manifest that this would give him no interest in the property. He would have an interest in the event of its destruction or nondestruction, but no interest in the property. A man’s interest in property insured is so distinct from the insurance that, unless he has such an interest independent of the insurance, his policy will be void.”

PROCEDURE—TIME FOR TAKING ADVANTAGE OF STATUTE.

172. The owner may take advantage of the statute at any time before he is actually compelled to pay the money.

Under the American practice, he may contest his liability for any damages at all, fight that through all the courts,

and, if finally defeated, take advantage of the statute.¹ But if there is only one claim, it is better to set up the right to limit liability in the original suit, as there is some conflict of decision on the question whether an independent proceeding will lie on only one claim.²

SAME—DEFENSE TO SUIT AGAINST OWNER, OR INDEPENDENT PROCEEDING.

173. The statute may be set up either by defense to a suit brought against the owner, or by an independent proceeding under the federal admiralty rules.

If it is desired to defend simply against one claim, the simplest method of doing so is by answer or plea in the suit asserting that claim against the owner. Hence it is well settled that this is a proper mode of taking advantage of the statute, and it may be invoked either in the federal or state courts.¹

Where the claims are many, and it is desired to convene them all in one proceeding, the usual method is by petition in the federal court. The procedure on these petitions is regulated by Admiralty Rules 54-58.²

This petition may be filed even before any suit is brought at all against the owner.³

§ 172. ¹ *THE BENEFACITOR*, 103 U. S. 239, 26 L. Ed. 351; *The S. A. McCaulley* (D. C.) 99 Fed. 302.

² *The Eureka* (D. C.) 108 Fed. 672.

§ 173. ¹ *THE SCOTLAND*, 105 U. S. 24, 26 L. Ed. 1001; *The Great Western*, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. Ed. 156; *Loughin v. McCaulley*, 186 Pa. 517, 40 Atl. 1020, 48 L. R. A. 33.

² As this treatise is on admiralty jurisdiction, and can only cursorily allude to procedure, the discussion of procedure on this act will necessarily be very brief. The reader is referred to the excellent treatise of Mr. Benedict on Admiralty for further details of procedure.

³ *Ex parte Slayton*, 105 U. S. 451, 26 L. Ed. 1036.

If suits are pending against the owner in other jurisdictions, the proceeding in the admiralty court is exclusive; and litigants in the other courts may be enjoined from litigating further in those courts, and may be compelled to come into the admiralty court. This is one of the cases in which injunctions to proceedings in state courts are not forbidden by section 720 of the Revised Statutes.⁴

METHOD OF DISTRIBUTION.

174. Under the express provisions of the statute, all claims filed, whether they have an admiralty lien attached or are mere personal claims against the owner, are paid pro rata.¹

This pro rata rule applies simply to the claims on the voyage, which, as seen above, is taken as the unit. Questions of priority as between those claims and claims on other voyages cannot well arise in the proceeding; for it has been seen that, when the owner seeks the benefit of the statute, he must surrender the res clear of all prior liens or claims against it. Hence, under this procedure, the court has in its possession an unincumbered res, and divides that pro rata among those who have suffered on that special voyage, regardless of the marshaling of other claims which would take place if no proceeding for limitation of liability was pending.

⁴ *PROVIDENCE & N. Y. S. S. CO. v. MANUFACTURING CO.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; *In re Whitelaw* (D. C.) 71 Fed. 733, 735.

§ 174. ¹ *The Maria & Elizabeth* (D. C.) 12 Fed. 627; *The Catskill* (D. C.) 95 Fed. 700; *The St. Johns* (D. C.) 101 Fed. 469; *Glaholm v. Barker*, L. R. 2 Eq. 598; *Id.*, 1 Ch. App. 223.

CHAPTER XVII.

OF THE RELATIVE PRIORITIES OF MARITIME CLAIMS.

- 175. Relative Rank as Affected by Nature of Claims.
- 176-177. Contract Claims in General.
- 178. Seamen's Wages.
- 179. Salvage.
- 180. Materials, Supplies, Advances, Towage, Pilotage, and General Average.
- 181. Bottomry.
- 182. Mortgages.
- 183. Tort Claims.
- 184. Relative Rank as Affected by Dates of Claims—Among Claims of Same Character.
- 185. Among Claims of Different Character.
- 186. Between Contract and Tort Claims.
- 187. Between Two Tort Claims.
- 188. Relative Rank as Affected by Suit or Decree.

RELATIVE RANK AS AFFECTED BY NATURE OF CLAIMS.

175. The order in which liens are paid depends upon four contingencies :
- (a) The relative merit of the claims.
 - (b) The time at which the claim accrued.
 - (c) The date at which proceedings are commenced for its enforcement.
 - (d) The date of the decree.

The question of the relative rank of maritime claims is the subject of much conflicting decision, from which it is impossible to extract any inflexible general rule. While there are elementary principles underlying the doctrine, they may be affected at any time by special equities or circumstances superseding the general principles, and forming an exception to

them. On this subject, Judge Brown, when District Judge of the Eastern District of Michigan, well said in the case of *THE CITY OF TAWAS*:¹

"The subject of marshaling liens in admiralty is one which, unfortunately, is left in great obscurity by the authorities. Many of the rules deduced from the English cases seem inapplicable here. So, also, the principles applied where the contest is between two or three libelants would result in great confusion in cases where 50 or 60 libels are filed against the same vessel. The American authorities, too, are by no means harmonious, and it is scarcely too much to say that each court is a law unto itself."

SAME—CONTRACT CLAIMS IN GENERAL.

176. Claims must first be considered in reference to their general nature, as there is supposed to be an inherent merit in certain ones over others, in the absence of special equities arising from the comparative dates of their service and other considerations.

177. Among contract claims in general the order of rank may be stated:

- (a) Seamen's wages.
- (b) Salvage.
- (c) Materials, supplies, advances, towage, pilotage, and general average.
- (d) Bottomry.
- (e) Mortgages.

§ 175. ¹ (D. C.) 3 Fed. 170.

SAME—SEAMEN'S WAGES.

178. It has long been a favorite principle of the admiralty that seamen's wages are of the highest rank and dignity, adhering to the last plank of a ship, and ranking all other contract claims of the same relative dates.

In the case of *The Virgo*,¹ District Judge Benedict, in passing upon their rank as compared to salvage and other supplies, held them to rank even supplies furnished after the vessel was brought into port and after the wages had accrued, as the supplies were of a nature that did not add anything to the value of the vessel, and as the time was so short that the seamen could hardly have been responsible for not proceeding more promptly. In the opinion he says:

"I am of the opinion, therefore, that the wages of the seamen, which are nailed to the last plank of the ship, and which under no circumstances contributed to the general average, as well as the salvage demand, are entitled to priority in payment over the demands of the other libelants, no one of whom, it will be observed, in any degree added by their services to the value of the vessel, or in the slightest degree increased the fund realized from her sale. It is a case of some hardship to the material men, no doubt, but no greater than in the ordinary case where the vessel proves insufficient in value to pay her bills. The hardship in this case arises, not from any fault on the part of the salvors or the seamen, but from the fact that the material men furnished what they did to a vessel so largely incumbered by liens superior in grade to their demands."

In the case of *The Paragon*,² Judge Ware said:

"Among privileged debts against a vessel, after the ex-

§ 178. ¹ (D. C.) 46 Fed. 294.

² 1 Ware, 326, Fed. Cas. No. 10,708.

penses of justice necessary to procure a condemnation and sale, and such charges as accrue for the preservation of the vessel after she is brought into port (1 Valin, Comm. 362; Code Commer. No. 191), the wages of the crew hold the first rank, and are to be first paid. And so sacred is this privilege held that the old ordinances say that the savings of the wreck, are to the last nail, pledged for their payment. Consulat de la Mer, c. 138; Cleirac sur Jugemens d'Oleron, art. 8, note 31. And this preference is allowed the seamen for their wages independently of the commercial policy of rewarding their exertions in saving the ship, and thus giving them an interest in its preservation. The priority of their privilege stands upon a general principle affecting all privileged debts; that is, among these creditors he shall be preferred who has contributed most immediately to the preservation of the thing. 2 Valin, Comm. 12, liv. 3, tit. 5, art. 10. It is upon this principle that the last bottomry bond is preferred to those of older date, and that repairs and supplies furnished a vessel in her last voyage take precedence of those furnished in a prior voyage, and that the wages of the crew are preferred to all other claims, because it is by their labors that the common pledge of all these debts has been preserved, and brought to a place of safety. To all the creditors they may say, 'Salvam fecimus totius pignoris causam.' The French law (Ord. de la Mar. liv. 1, tit. 14, art. 16; Code Commer. 191) confines the priority of the seamen for their wages to those due for the last voyage, in conformity with the general rule applicable to privileged debts; that is, that the last services which contribute to the preservation of the thing shall be first paid. But this restriction is inapplicable to the engagements of seamen in short coasting voyages, which are not entered into for any determinate voyage, but are either indefinite as to the terms of the engagement, and are determined by the pleasure of the parties, or are for some limited period of time."

Wages for a voyage have been also held to rank a bottomry bond executed for the necessities of that very voyage, because, but for the efforts of the seamen, the vessel would not have reached port, and the bottomry bondholder would have had nothing to hold for his claim.³

If they rank subsequent materials under the circumstances just explained, a fortiori they rank materials and supplies practically concurrent with them.⁴

They also rank salvage, and even damage claims incurred on a previous voyage, under the principle, which we have seen running through all the admiralty law, that the prior lienholders have a *jus in re* or a proprietary interest in the ship itself, and that efforts tending to the preservation of the *res* are incurred for their benefit, and therefore rank them.⁵

SAME—SALVAGE.

179. Salvage may rank any prior claim for which it saves the *res*.

It may not be entirely accurate to put salvage behind even seamen's wages when we consider its general nature.

It is well settled that the salvor ranks even seamen's wages incurred prior to the salvage services, upon this same general principle that it tends to the preservation of the *res*, without which the seamen themselves might lose their security.¹

In the leading case of *THE FORT WAYNE*,² the court,

³ *THE DORA* (C. C.) 34 Fed. 348; *The Irma*, 6 Ben. 1, Fed. Cas. No. 7,064.

⁴ *Saylor v. Taylor*, 23 C. C. A. 343, 77 Fed. 476.

⁵ *The Lillie Laurie* (C. C.) 50 Fed. 219.

§ 179. ¹ *The Selina*, 2 Notes Cas. Adm. & Ecc. 18; *The Athenian* (D. C.) 3 Fed. 248.

² 1 Bond, 476, Fed. Cas. No. 3,012.

discussing this question, and deciding that salvage was ahead even of prior seamen's wages, says:

"It may be remarked here that it does not admit of doubt, nor is it controverted in this case, that, if there had been a salvage service rendered by the wrecking company within the meaning of the maritime law, it imports a lien in their favor which has priority over claims for wages earned, or supplies furnished, before the sinking of the boat. This is well-established law, and has its basis in obvious principles of justice and reason. Meritorious salvors stand in the front rank of privilege, and the rights of those having liens before the salvage service must be secondary to those having a salvage claim. This principle is well stated in Coote's Admiralty Practice. The author says (page 116): 'The suitor in salvage is highly favored in law, on the assumption that, without his assistance, the res might have been wholly lost. The service is, therefore, beneficial to all parties having either an interest in or a claim to the ship and her freight and cargo.' And again (page 117), it is laid down that 'salvage is privileged before the original or prior wages of the ship's crew, on the ground that they are saved to them as much as, or eadem ratione qua, the ship is saved to the owners.' This doctrine is so well settled, both by the English and American authorities, that it is useless to multiply citations."

For the same reason salvage is superior in dignity to materials and supplies.³

It is also ahead of the cargo's claim for general average arising out of a jettison on the voyage when the vessel was subsequently wrecked, for the reason that the salvor saved the only property against which the claim for general average could be asserted.⁴

³ The *M. Vandercook* (D. C.) 24 Fed. 472; The *Virgo* (D. C.) 46 Fed. 294; The *Lillie Laurie* (C. C.) 50 Fed. 219.

⁴ The *Spaulding*, 1 Brown, Adm. 310, Fed. Cas. No. 13,215.

Judge Longyear, in delivering the opinion, says:

"It was conceded on the argument, and such is undoubtedly the law, that the lien for salvage takes precedence of the lien for general average. The libel of the insurance companies in this case is in terms for general average, and I can see nothing in the circumstances of the case to warrant the court in holding it to be anything else, even if the libel had been otherwise. Without the salvage services, the whole was a loss. With the salvage services, the loss is reduced to a part only. In the former case there would have been nothing left upon which a lien for general average could attach. In the latter case it has something upon which it may attach, solely because of the salvage services; and it would be not only contrary to the general rule of law above stated, but unjust and inequitable, to place such lien as to the part thus saved upon the same footing, as to precedence, as the lien for the salvage services."

SAME--MATERIALS, SUPPLIES, ADVANCES, TOWAGE, PILOTAGE, AND GENERAL AVERAGE.

180. Materials, supplies, advances, towage, pilotage, and general average are, in the absence of special circumstances, equal in dignity.

These may be considered in general as of the same relative rank, in the absence of special circumstances or equities.

For some time there was quite a conflict in the decisions on the question whether the liens of material men arising out of a state statute were equal in dignity to those arising under the general admiralty law. On principle there would seem to be no sound reason for any such distinction. The only reason why these state statutes are given force at all is that the subject-matter is maritime in its nature, and that the statutes merely superadd the remedy in rem. If marine in its

nature, it ought to be marine in its rights. The state statute adds nothing to its dignity or to its character. It merely changes a presumption of credit. Hence the later authorities have settled that foreign and domestic liens of material men rank alike.¹

Claims of this nature also rank a prior bottomry. In the case of *The Jerusalem*,² Mr. Justice Story gives the reason for this. He says:

"If, then, the repairs in this case were a lien on the ship, it remains to consider whether they constitute a privileged lien, entitled to a preference over a bottomry interest; for the proceeds now in court are insufficient to answer both claims. In point of time the bottomry interest first attached, and the right became absolute by a completion of the voyage before the repairs were made. Upon general principles, then, the rule would seem to apply, '*Qui prior est tempore, potior est jure.*' But it is to be considered that the repairs were indispensable for the security of the ship, and actually increased her value. They are, therefore, not like a dry lien by way of mortgage, or other collateral title. The case is more analogous to that of a second bottomry bond, or the lien of seamen's wages, which have always been held to have a priority of claim, although posterior in time, to the first bottomry bond. Let a decree be entered for payment of the sum claimed by the petitioner out of the proceeds of the sale."

In the case of *The Felice B.*,³ Judge Benedict gave preference, under similar circumstances, because the repairs went into the ship, and tended to increase her value, and to enhance to that extent the price which she brought at auction; and he therefore thought it inequitable that the bottomry

§ 180. ¹ *The Guiding Star* (D. C.) 9 Fed. 521; *Id.* (C. C.) 18 Fed. 264; *The Wyoming* (D. C.) 35 Fed. 548.

² 2 Gall. 345, Fed. Cas. No. 7,294.

³ (D. C.) 40 Fed. 653. See, also, *The Aina* (D. C.) 40 Fed. 269.

bond holder should claim this increment, which was not in existence when he loaned his money.

As to the relative rank of claims for unpaid towage and claims of material men, there would seem to be no reason for drawing any distinction between them, in the absence of special equities, and the courts have usually put them upon the same basis.⁴

But in the case of *The Mystic*,⁵ Judge Blodgett seemed to look upon tugboat men with special favor. The case arose in the city of Chicago, where the ordinances required vessels to use tugs, and where, on account of the narrow and crowded channels, it is a physical impossibility for sail vessels to reach their destination without tugs. Under these special circumstances he held that the value of the towage service was about equal to that of the seamen, as the tug was doing seamen's work, and he placed the tow bills immediately after the seamen's wages, and ahead of domestic supply claims.

SAME—BOTTOMRY.

181. Bottomry ranks low among maritime claims, as the lender is paid for the risk he runs by a high rate of interest.

Among bottomry bonds on the same voyage, though the dates may be slightly different, there is no priority.¹ But the bottomry bond holder is relegated to the background when he comes in competition with seamen's wages, salvage, materials, or even a claim for general average arising on the same voyage.² The reason is that the bottomry holder stands in the shoes of the owner, and has, as heretofore

⁴ *Saylor v. Taylor*, 23 C. C. A. 343, 77 Fed. 476; *The Sea Witch*, 3 Woods, 75, Fed. Cas. No. 11,289.

⁵ (D. C.) 30 Fed. 73.

§ 181. ¹ *THE DORA* (D. C.) 34 Fed. 343.

² *Id.*

explained, a proprietary interest in the ship, which estops him from questioning the priority of maritime liens to supply her, or to render her more valuable. In addition, the bottomry holder can charge a premium on the ship at a high rate of interest. He therefore becomes practically an insurer against perils of the sea, and when those perils of the sea arise he cannot be heard to complain that those who labored to rescue the vessel from them should be preferred in the distribution. Accordingly, these claims for general average arising on the voyage, and the claims of the agents at the port of destination for putting the ship in better shape, are preferred to a bottomry bond. On this point Judge Billings says in the case of *The Dora*:³

"Whoever lends money upon a bottomry obligation for the ordinary transactions of her voyage has a lien upon the vessel which outranks all lien holders save the mariners for their wages. But where maritime services or sacrifices or expenditures are rendered necessary which carry with them maritime liens, the holder of the bottomry bond, like any other mortgagee or pledgee, has his conditional interest burdened precisely as if he were to that extent an owner. Indeed, the bottomry holder can be no more than absolute owner, so far as third persons are concerned. To hold any more restricted doctrine would prejudice the interests of the bottomry holder himself. It is for his interest, as well as for that of all other absolute or conditional owners, that the whole should be saved by a sacrifice of a part, and that the whole thus saved should contribute to make good the sacrifice, and that salvors and all others who render benefits which save or render available the bottom pledged to him should have a lien upon that bottom, even against him. See *Williams & B. Adm. Jur.* 64, 65, and *Macl. Shipp.* 702-705. I think that, upon reason and authority, the general average should be paid before the bottomry bonds. The transac-

³ See, also, *THE ALINE*, 1 W. Rob. Adm. 112.

tions out of which the general average arose were subsequent to these bonds, and aided in providing and making available the bottom which these bonds contingently represented."

SAME—MORTGAGES.

182. Mortgages rank below all maritime claims.

The mortgagee is worse off than any, for his claim is not marine. He merely claims through the owner, from whom he is only one step removed, and accordingly all marine claims are preferred to his debt; and even recording it under section 4192 of the Revised Statutes does not affect this principle.¹

SAME—TORT CLAIMS.

183. These claims, whether for pure torts or torts where there are also contract relations, rank prior contract claims, and probably subsequent contract claims, where the contract claimant has an additional remedy against the owner.

These claims, as a general rule, rank all prior contract claims. The leading case on this subject is *THE JOHN G. STEVENS*.¹ Mr. Justice Gray, in delivering the opinion of the court in that case, says:

"The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege,—*jus in re*,—a proprietary interest in the offending ship, and which, when enforced by admiralty process in rem, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make com-

§ 182. ¹ *THE J. E. RUMBELL*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

§ 183. ¹ 170 U. S. 113, 18 Sup. Ct. 511, 42 L. Ed. 969.

pensation for the wrong done. The owner of the injured vessel is entitled to proceed in rem against the offender, without regard to the question who may be her owners, or to the division, the nature, or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests existing at the time of the collision in the offending vessel, whether by way of part ownership, of mortgage, of bottomry bond, or of other maritime lien for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh*, before cited, of the holder of an earlier bottomry bond, under the law of England, 'so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim.' 1 Moore, P. C. 285."

This reasoning is a necessary deduction from the doctrine, now well settled, that an admiralty claimant has not merely a right to arrest a vessel, but a proprietary interest in the vessel itself,—a *jus in re*. Consequently, any contract claimant who permits the vessel against which he has a claim to be navigated assumes the risks of navigation to that extent, and holds her out to the world as liable to those with whom she is brought into relations even involuntarily on their part. The only question directly decided in this case was that a claim for damages from negligent towage ranked a prior claim for materials and supplies. The questions as to all other contracts were carefully reserved by the court, but the line of reasoning which the court follows is equally applicable to any other contract claim.

On this question the decisions in the New York circuit,

which are usually of such high authority that the admiralty lawyer instinctively turns to them first, cannot now be relied on. *THE JOHN G. STEVENS CASE* cites a great number of them for the purpose of deciding adversely to the doctrine which they had promulgated. It had been the preponderance of authority in that circuit that contract claims ranked tort claims. The principal reason given for this was that these tort claims were perils of the sea, against which the owner could insure. In arriving at that decision the New York judges had discussed the English cases on which the contrary doctrine had been based, and concluded that they had not passed upon the question at all, but were governed by peculiar circumstances arising out of the fact that the vessels in the English cases had nearly always been foreign vessels. The New York judges also had attempted to draw a distinction between claims of pure tort and claims of quasi tort arising out of contract. This was to meet the suggestion of Dr. Lushington in *THE ALINE*,² in which he had said that the contract creditor had his option whether to deal with the ship or not, but the tort creditor had not. Accordingly, the New York courts argued that this principle could only apply to torts like collision, in any event, and could not apply to cases arising out of negligent towage, or other such cases arising out of contract though torts in form where there had been such negligence. This distinction, also, is overruled by *THE JOHN G. STEVENS CASE*,³ which was a case of negligent towage, and in which the supreme court, after considering the question fully, decided that cases of tort, whether arising out of contract or not, all stood on the same basis.

THE JOHN G. STEVENS CASE expressly reserves the question whether the claim for tort should be preferred to a prior claim for seamen's wages, but the reasoning of

² 1 W. Rob. Adm. 112.

³ 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969.

that case applies with equal force even to claims of as high merit as seamen's wages, and it is believed that, when the question is fairly presented, a preference will be given to tort claims even over claims for prior wages.⁴

The case of *THE ELIN*⁵ decided that preference should be given even to subsequent wages on the same voyage. On this point Sir Robert Phillimore quoted approvingly from an opinion of Dr. Lushington, as follows:

"I adhere to this opinion, and I do so especially for the following reasons: That by the maritime law of all the principal maritime states the mariner has a lien on the ship for his wages against the owner of that ship. That he has also a right of suing the owner for wages due to him. That some uncertainty may exist as to the mariner's lien when in competition with other liens or claims, and amongst these I might instance the case of a ship in the yard of a shipwright. In such a case I should have no difficulty in saying that the lien of the shipwright would be superior to the lien of the mariner. That, in the case of a foreign ship doing damage and proceeded against in a foreign court, the injured party has no means of obtaining relief save by proceeding against the ship itself; and that, I apprehend, is one of the most cogent reasons for all our proceedings in rem. That, in a case where the proceeds of a ship are insufficient to compensate for damages done, to allow the mariner to take precedence of those who have suffered damage would be to exonerate so far the owner of the ship, to whom the damage is imputed, at the expense of the injured party,—the wrongdoer at the expense of him to whom wrong has been done. Then, as to the mariner, what is the hardship to which he is exposed? It is true, he is debarred from proceeding against the ship, but his right to sue the owner remains unaffected. It is, however, not to be forgotten that in all these cases of damage, or

⁴ *The Freestone*, 2 Bond, 234, Fed. Cas. No. 12,143.

⁵ 8 Prob. Div. 39.

nearly all, the cause of the damage is the misconduct of some of the persons composing the crew. This is not the case of a bankrupt owner. It will be time to consider such case when it arises."

This reasoning, that the seaman has a double remedy against the owner, and that it would be inequitable to allow the owner to practically diminish the security of the party injured through his own torts by allowing the seamen to be paid out of the vessel, is certainly a strong one, and receives added strength in America by the fact that the act of June 26, 1884, allowing the vessel owners to plead their limitation of liability against contract debts, expressly reserves the rights of seamen; and so it would seem equitable that a party asserting a lien by tort should be preferred even to seamen's wages, though the question cannot be considered as settled.

An instance of such torts is an unlawful conversion by the master.*

RELATIVE RANK AS AFFECTED BY DATES OF CLAIMS—AMONG CLAIMS OF SAME CHARACTER.

184. Among contract claims of the same character, those furnished on the last voyage rank those furnished on a prior voyage; the reason being that they are supposed to contribute more immediately to the preservation of the res, and therefore are for the benefit of the prior claims.¹

In the old days, when voyages were measured by long periods of time, this was a just rule; but now, when voyages are comparatively short, it has been found necessary

* *The Escanaba* (D. C.) 96 Fed. 252.

§ 184. ¹ *THE OMER*, 2 Hughes, 96, Fed. Cas. No. 10,510; *The Sea Witch*, 3 Woods, 75, Fed. Cas. No. 11,289.

in the interest of justice to introduce considerable modifications. For instance, in litigation arising on the Lakes the relative priorities are determined not by the voyages, but by the seasons of navigation. For several months of the year navigation there is closed by ice, and the courts have settled upon the rule that claims furnished during one season rank those furnished during a previous season; and this rule is applied in New York harbor also as to boats which operate by seasons, like canal boats.²

But in New York harbor work, as to boats which are being used practically all the year round, the courts have settled upon the rule that claims furnished within forty days are preferred to those furnished prior to that date, the basis of the rule being that it is usual to sell on thirty days' time, the ten days extra being allowed for making demand or proceeding. As among claims of the same general character within the forty days, there is no difference in rank.³

In the Eastern district of Virginia, where ice does not interrupt navigation, the rule of voyages has been applied when the voyages were of any length; but among harbor tugs or vessels the practice has been that debts of the same general character are put on the same footing if they have been furnished within a year. The question in that district has been considered mainly in reference to the doctrine of staleness. A claim over a year old is considered stale as against other admiralty claims, and all within a year are placed upon the same general footing. There is no reported decision to this effect, but it has long been a settled rule of practice in that district.

This rule of considering claims over one year old as stale, however, has only been applied in that district as among marine claims, and must not be confused with the doctrine

² THE CITY OF TAWAS (D. C.) 3 Fed. 170; The Arcturus (D. C.) 18 Fed. 743; The J. W. Tucker (D. C.) 20 Fed. 129.

³ The Gratitude (D. C.) 42 Fed. 299; The Samuel Morris (D. C.) 63 Fed. 736.

of staleness as applied in relation to subsequent purchasers. In such case, in that district, claims have been held stale as against innocent purchasers in much less time than a year. On the other hand, the one-year rule as among maritime claims has frequently been relaxed, and the time extended, where the vessel has been absent from the district for long periods.

SAME—AMONG CLAIMS OF DIFFERENT CHARACTER.

185. A later service immediately contributing to the preservation of the res may, on that account, be preferred to claims which otherwise would rank it.

The last may sometimes be preferred on that account even though, if the dates were the same, the one so preferred would be an inferior claim. For instance, in the case of *THE FORT WAYNE*,¹ a claim for repairs to the vessel rendered when salvors had taken charge of her after a disaster (the repairs being of a character almost necessary to enable her to reach port) was preferred even to prior wages, and was made to rank next to the salvage. On this point the court says:

"I can have no hesitation, therefore, in holding that the claim of the Eureka Insurance Company is established by the evidence, and is a lien on the boat, ranking in privilege next to the salvage claim of the Missouri Wrecking Company. This lien rests on the footing of money loaned or advanced for repairs to the boat, without which it would have been of little value, and could not possibly have prosecuted its business. The money so advanced and applied may be supposed, therefore, to have inured to the benefit of prior lienholders. And, according to the doctrine distinctly asserted by Dr. Lushington in the case of *The Aline*,

§ 185. ¹ 1 Bond, 476, Fed. Cas. No. 3,012.

1 W. Rob. Adm. 119, 120, the persons making such advances have a priority, to the extent of the repairs made, over all other lienholders. But the case before me does not call for a more extended exposition of this principle."

For similar reasons a material man's claim has been preferred to a prior towage claim.²

SAME—BETWEEN CONTRACT AND TORT CLAIMS.

186. On this account a later contract claim may rank a prior tort claim.

An interesting illustration of this was *The Jeremiah*.¹ There salvors rescued a vessel which had been in collision, and was so hung to the other vessel that it required some force to get them apart. The court held, that the salvage claim had priority over the collision claim.

So, too, in *THE ALINE*,² Dr. Lushington, while preferring, as we have heretofore seen, the tort claims to a prior bottomry bond, held also that a bottomry bond for supplies subsequently furnished ranked the tort claim, for the reason that the tort claim could only go against the vessel as it was at the time of the collision, and had no right to subject a subsequent increment to the vessel like this.

SAME—BETWEEN TWO TORT CLAIMS.

187. Between two tort claims, the last should rank; but this is not settled.

An interesting case on this subject was *THE FRANK G. FOWLER*.¹ In that case there were two successive collisions so close together that no question of laches could

² *The Dan Brown*, 9 Ben. 309, Fed. Cas. No. 3,556.

§ 186. ¹ 10 Ben. 338, Fed. Cas. No. 7,290.

² 1 W. Rob. Adm. 112.

§ 187. ¹ (D. C.) 8 Fed. 331; *Id.* (C. C.) 17 Fed. 653.

well arise between the two. Under such circumstances District Judge Choate held that the last was entitled to priority, as the first collision claim had a *jus in re*, or a proprietary interest, in the vessel, and therefore was somewhat in the position of an owner. In his opinion he says:

"A party who has already suffered such a damage has such a lien or hypothecation of the vessel. He is to that extent in the position of an owner,—he has a quasi proprietary interest in the vessel. It is true, he cannot, as an owner, control her employment, or prevent her departure on another voyage, except by the exercise of his right or power to arrest her for the injury to himself; and in some cases the second injury may be done before he has an opportunity to arrest her. Yet, if her continued employment is not his own voluntary act, nor with his own consent, it is his misfortune that the vessel in which he has an interest is used in a manner to subject herself to all the perils of navigation. This use, unless he intervenes to libel and arrest her, is perfectly lawful as against him. If she is lost by shipwreck, of course his lien becomes valueless, and I think his interest is not exempted from this other peril to which the vessel is liable, namely, that she may become bound to any party injured through the torts of the master and mariners. The principle as to marine torts is that the ship is regarded as the offending party. She is liable in *solido* for the wrong done. The interests of all parties in her are equally bound by this lien or hypothecation, whether the master and mariners are their agents or not. In the case of *The Aline*, 1 W. Rob. Adm. 118, Dr. Lushington says: 'I am also of opinion that neither the mortgagee nor bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason that the mortgage or bottomry bond might, and often does, extend to the whole value of the ship. If, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a

remedy; more especially where, as in this case, the damage is done by a foreigner, and the only redress is by a proceeding against the ship.' Commenting on this decision in the case of *The Bold Buccleugh*, *ut supra*, the court says: 'In that case there was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding in *rem* must be preferred to the first bondholder, but was not entitled, against the second bondholder, to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he or others were interested was liable to its value at that date for the injury done, without reference to his claim.' I think the same principle is applicable to a prior lienholder, who, by the tort of the master and mariners, had become, so to speak, a part owner in the vessel. His property,—the vessel,—though not by his own voluntary act, has been used in commerce. That use was not tortious as to him. It is subject in that use to all ordinary marine perils. One of those marine perils is that it may become liable to respond to another party injured by the negligence of the master and mariners. No exception to the liability of the vessel, exempting the interests of parties interested in the ship, has been established by authority."

On appeal to Circuit Judge Blatchford this decision was reversed, the judge holding that the doctrine of the last being paid first only applied to such liens as were for the benefit of the vessel, and tend to the preservation of the res, and did not apply to torts, which tend rather to destroy than to benefit.

If the principles laid down by the supreme court in *THE JOHN G. STEVENS CASE* are to be the guide, it would seem that the district judge was the one who should be followed. When we once settle the doctrine that a maritime

lien is a *jus in re*, or a proprietary interest in the ship, it would seem to follow necessarily that the owner of that interest, even if not guilty of laches, and even if having no control over the master in charge, impliedly takes the risks of subsequent accidents, and holds the ship out to the world as a thing of life, liable to make contracts and to commit torts, and that he should not be heard to dispute the claims of others who have been brought into relations with her upon this basis.

RELATIVE RANK AS AFFECTED BY SUIT OR DECREE.

188. The earlier decisions held that among claims of otherwise equal dignity the party first libeling was entitled to be first paid, on the theory that an admiralty lien was a mere right of arrest; but the later decisions, establishing it as a proprietary right or interest in the thing itself, have deduced from that principle that a prior petens has no advantage, and that the institution of suit does not affect the relative rank of liens.¹

In fact in many districts obtaining a decree does not give an inferior claim a priority which it would not otherwise have, but merely entitles the claimant to assert his claim without further proof, and debars others from contesting it on its merits, leaving open simply the question of priority.²

This is a question largely affected by local practice and local rules. In many districts independent libels are filed

§ 188. ¹ THE CITY OF TAWAS (D. C.) 3 Fed. 170; The J. W. Tucker (D. C.) 20 Fed. 129; Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476.

² THE CITY OF TAWAS (D. C.) 3 Fed. 170; The Alma (D. C.) 49 Fed. 269.

against the vessel. In some the vessel is arrested under the first libel, and the others come in by petition. In some districts, after a certain time all the claims are referred to a commissioner, to ascertain and report their relative rank. In others, in the event of no contest, a decree is entered at the return day, or as soon thereafter as possible, giving petitioners a judgment against the vessel, and directing a sale. It is impossible to lay down any rule on the subject.

In the Eastern district of Virginia the practice is that all claims filed up to the answer day are paid according to their relative character, it matters not which libels first. But all claims after the answer day, even though otherwise prior in dignity, come in subject to those already filed. In that district the rule has been inflexible that claims coming in after a decree has been entered, and an order of sale made, are subject to the others, the reason being that the rules of that district allow nearly three weeks between the libel day and the answer day, which therefore give ample time for coming in, and it being further thought that bidders at the sale ought to know their relative rights in order to enable them to decide upon their bids. Those creditors who stay out until others more diligent than themselves bring suit, secure a sale, attend the sale, and make the vessel bring a good price, are not permitted to intervene then, and displace those who have borne the heat and burden of the fight.

In the absence of special equities, the rule of practice in the Eastern district of Virginia would certainly seem a fair one, well calculated to make vessels bring their full value, and to make marine claimants assert their claims seasonably, without allowing them to prejudice the rights of others.³

³ See, also, *The Saracen*, 2 W. Rob. Adm. 453.

CHAPTER XVIII.

A SUMMARY OF PLEADING AND PRACTICE.

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SIMPLICITY OF ADMIRALTY PROCEDURE.

189. Admiralty procedure is like chancery pleading in simplicity and flexibility.

Admiralty pleading and practice are extremely simple; more so even than proceedings in chancery, though governed largely by the liberal principles which prevail in that forum.¹

By this it is not meant that an admiralty court has any

§ 189. ¹ *Richmond v. Copper Co.*, 2 Low. 315, Fed. Cas. No. 11,800.

chancery jurisdiction. It has no jurisdiction, for instance, of matters of account, except incidentally, where an account is necessarily involved in exercising jurisdiction conferred on some other ground.²

Nor has it jurisdiction of controversies arising from titles merely equitable.³

190. PROCEEDINGS IN REM AND IN PERSONAM.

Admiralty proceedings fall under two great classes,—proceedings in rem and proceedings in personam. In the first, the thing itself against which the right is claimed or liability asserted is proceeded against by name, irrespective of its ownership, arrested or taken into legal custody, and finally sold to answer the demand, unless its owner appears and bonds it.

A proceeding in personam is an ordinary suit in admiralty against an individual. It may be instituted by a monition, which substantially corresponds to an ordinary summons in a common-law suit, or it may be accompanied in proper cases by a process of foreign attachment, or it may also have a warrant of arrest of the person in cases where the state law permits an arrest.¹

Whether to proceed in rem or in personam in a given case is rather a question of substantive law than of practice. It depends on the question whether there is an admiralty lien, and the discussion under the previous subjects of these lectures must be adverted to in order to decide. Admiralty Rules 12–20 contain provisions when the suit may be in rem, when in personam, and when in both. But they are not intended to be exclusive, or to say that in

² *Grant v. Poillon*, 20 How. 162, 15 L. Ed. 871; *The H. E. Willard* (C. C.) 52 Fed. 387.

³ *THE ECLIPSE*, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269.

§ 190. ¹ Admiralty Rule 48.

cases not covered by their terms there shall be no remedy, whether in either form or in both combined.²

'Proceedings in Rem Bind the World.'

It is a maxim of the law that proceedings in rem bind the world. In such proceedings no notice is served on the owner. It is presumed that a seizure of his property will soon come to his knowledge, and cause him to take steps to defend it; and when he appears for that purpose he comes in rather as claimant or intervenor than as defendant. Hence, if he does not appear, the judgment binds only the property seized, and, if it does not satisfy the claim, no personal judgment can be given against him for the deficiency. In ordinary suits of foreign attachment in the state courts, the debtor is defendant by name, and, if he appears, a personal judgment may be rendered against him; but not so in admiralty suits in rem, for the real defendant there is the vessel or other property, and the owner appears not as defendant, but as claimant.³

Hence, when the maxim says that a proceeding in rem binds the world, it merely means that all having any interest in the res have constructive notice of its seizure, and must appear and protect their interest. Hence, as every obligation implies a correlative right, no one is bound to appear whose interest is of a character which does not permit him to appear; and such are not bound by the proceeding, except in so far as they may be bound through their vendors or other parties in privity.⁴

² THE CORSAIR, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.

³ Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; O'Brien v. Stephens, 11 Grat. 610; The Davis, 10 Wall. 15, 19 L. Ed. 875.

⁴ THE ECLIPSE, 135 U. S. 599, 10 Sup. Ct. 873, 34 L. Ed. 269; Cushing v. Laird, 107 U. S. 69, 2 Sup. Ct. 196, 27 L. Ed. 391.

191. THE ADMIRALTY RULES OF PRACTICE.

In 1842 congress passed an act directing the supreme court to prepare and promulgate rules to govern the procedure and practice in admiralty. In pursuance of this statute, the court promulgated the rules to regulate the admiralty practice in the inferior courts now known and cited as the "Admiralty Rules." They form an admirably simple and harmonious system, and have worked so well that they are to-day practically in the form of the original draft, the only material change being the addition of a few to regulate limited liability proceedings, and one to authorize bringing in the other vessel where only one of two colliding vessels is libeled.

An admiralty court is not a court of terms, but is always open for the transaction of business.

192. THE LIBEL.

The first step in an admiralty suit is to file the libel. This is the written statement of the cause of action, corresponding to the declaration at common law and the bill in equity. It must be properly entitled of the court; addressed to the judge; must state the nature of the cause; that the property is within the district, if in rem, or the parties, their occupation and residence, if in personam; must then state the facts of the special case in separate articles clearly and concisely, and conclude with a prayer for process and a prayer for general relief. It may propound interrogatories to the adversary.¹

As a general rule, the libel should be in the name of the real party in interest, not in the name of one for the benefit of another. But the better opinion is that it may be amended by inserting the names of the real parties, or that, if they

§ 192. ¹ Admiralty Rule 23.

come in by supplemental libel, the proceedings will thereby be made regular.²

This principle does not prevent suits in a representative capacity. For instance, the master has wide powers as agent of all concerned, and may sue on behalf of owners of ship and cargo, and frequently on behalf of the crew.³

All parties entitled to similar relief on the same state of facts may join as libelants, in order to avoid multiplicity of suits. And for the same reason distinct causes of action may be joined in one libel. The practice in this respect is very liberal.⁴

In stating the facts of the special case useless verbiage and archaic terms, so frequent in common-law pleading, may safely be omitted. The narration may be made as simple as possible, provided, always, that those essentials common to any civilized system of pleading be observed,—to state the case with sufficient detail to notify the adversary of the grounds of attack, so that he may concert his defense. For instance, a libel in a collision case must specify the acts of negligence committed by the other vessel, though, if it does not do so, but merely charges negligence in general, and no exceptions are filed, it will not prevent the case from proceeding.⁵

² *The Ilos*, Swab. 100; *The Minna*, L. R. 2 Adm. & Ecc. 97; *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068; *The M. P. Rich*, Fed. Cas. No. 2,161; *The Anchoria* (D. C.) 9 Fed. 840; *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993.

³ *The Commander in Chief*, 1 Wall. 51, 17 L. Ed. 609; *The Blackwall*, 10 Wall. 1, 19 L. Ed. 870.

⁴ *The Queen of the Pacific* (D. C.) 61 Fed. 213; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 36 O. O. A. 135, 94 Fed. 180, reversed 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. —, but not on this question.

⁵ *THE MARPESIA*, L. R. 4 P. C. 212; *The Vlm* (D. C.) 2 Fed. 874; *The H. P. Baldwin*, 2 Abb. U. S. 257, Fed. Cas. No. 6,811.

193. AMENDMENTS.

In case the libel is thought defective, great latitude is allowed in amendments. Formal amendments are a matter of course, and amendments in matters of substance are in the discretion of the court. They may be made even on appeal, but not to the extent of introducing a new subject of litigation.¹

But the power of the court to allow amendments is a judicial discretion, not a mere caprice. It will not be so exercised as, under the guise of liberality to one party, to do injustice to the other. Hence, after the cause is at issue, and evidence has been taken, or the witnesses scattered, a court would be chary in allowing amendments, especially of matters known to the applicant for any length of time before the application is made.

"The propriety of granting this privilege in any particular case will depend on the circumstances by which it is attended. The application is addressed to the sound discretion of the court, and this discretion is to be exercised with a just regard to the rights and interests of both parties; care being taken that for the sake of relieving one party injustice shall not be done to the other."²

§ 193. ¹ Admiralty Rule 24.

² 2 Conk. Adm. 258. As examples of the limit put upon this power of amendments, see *The Keystone* (D. C.) 31 Fed., at page 416; *The Thomas Melville* (D. C.) 31 Fed. 486; *McKinlay v. Morrish*, 21 How. 347, 16 L. Ed. 100; *Lamb v. Parkman*, 1 Spr. 343, Fed. Cas. No. 8,020; *Coffin v. Jenkins*, 3 Story, 108, Fed. Cas. No. 2,948; *The Philadelphian*, 9 C. C. A. 54, 60 Fed. 423; *O'Brien v. Miller*, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469; *The Circassian*, 2 Ben. 171, Fed. Cas. No. 2,723.

194. THE PROCESS.

On filing the libel in rem an order for process is filed. It recites, "On reading the libel, and otherwise complying with the rules of court, let process issue."

This, though supposed to be signed by the judge specially in each case, is really a matter of course. The clerk keeps a lot of blank ones on hand, already signed.

Thereupon the process of arrest issues. It is directed to the marshal, and instructs him to seize the vessel, and give notice to all interested that on a certain day, fixed by the rules of each district, the case will come on for hearing, when and where they are cited to appear, and interpose their claims, and to return his action thereunder to the court.

The time fixed for hearing and set out in the warrant of arrest varies with the rules in different districts. It is usually about two weeks off, for the beauty of admiralty proceedings is their rapidity.

In the Eastern district of Virginia the return day is Tuesday of the week next after filing the libel, and the hearing day is ten days after that, which makes it always fall on Friday.

The warrant of arrest is signed by the clerk, and under the court seal. The marshal, on receiving it, makes out three notices, signed by himself, reciting that by virtue of the warrant he has seized the said vessel, and has her in his custody, and that all persons are cited to appear on the hearing day, and show cause why a final decree should not pass as prayed. He takes the warrant of arrest and one of these proclamations, and starts out on a quest for his prey. On finding her, he reads the warrant of arrest to the captain or other person in charge, and he pastes a copy of his proclamation on the most conspicuous part of the vessel. Then he returns to the court-room door, and pastes another there. And then, by way of making it more widely known, he goes to the newspaper designated by court rule, and publishes a

notice in substantially the same form. Meanwhile a ship keeper is in charge of the ship.

The marshal cannot serve process upon a ship in custody of an officer of a state court. Such an officer cannot sell the title clear of maritime liens, and so the admiralty claimant must wait till the other court lets go. As soon as its custody ends, the admiralty claimant may proceed against it, even in the hands of the state-court purchaser.¹

If the vessel owner wants possession of his ship, he is allowed, by section 941, Rev. St., to come in, give bond in double the amount of libellant's claim, and release her. This bond is a substitute for the vessel, and no suit is necessary upon it, but judgment may be given against the obligors on it in the final decree.*

195. DECREES BY DEFAULT.

If, on the hearing day, no defense has been interposed, then, under the provisions of Admiralty Rule 29, all persons are deemed in contumacy and default, the libel is taken for confessed, and the court hears the cause *ex parte*. In such case no proof is necessary, except as to damages, and the only hearing is the presentation of a decree to the judge.¹

In other words, a decree by default in admiralty resembles writs of inquiry at common law, or a bill taken for confessed in equity.²

§ 194. ¹ TAYLOR v. CARRYL, 20 How. 583, 15 L. Ed. 1028; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1,019, 38 L. Ed. 981; The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533.

* See post, p. 434.

§ 195. ¹ Cape Fear Towing & Transp. Co. v. Pearsall, 33 C. C. A. 161, 90 Fed. 435.

² Miller v. U. S., 11 Wall. 294, 20 L. Ed. 135; The Mollie, 2 Woods, 318, Fed. Cas. No. 15,795; The Water Witch (C. C.) 44 Fed. 95; Thompson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105; Cape Fear Towing & Transp. Co. v. Pearsall, 33 C. C. A. 161, 90 Fed. 435.

In case of such default the court may at any time within ten days, for cause shown, reopen the decree, and permit defense. But in default decrees this power is limited to ten days. On the lapse of that time the decree becomes just as final as a court judgment after the adjournment of the term.³

There is some conflict of authority whether there is such a thing known to the admiralty law as a libel of review. The better opinion seems to be that there is; but it is a power reluctantly exercised, and lies only for errors apparent on the face of the record, or for fraud. It does not lie to enable a party to set up facts or defenses which his own carelessness overlooked.⁴

196. THE DEFENSE.

If the defendant does not wish to let his case go by default, he raises any legal points apparent on the libel by exception, which corresponds to a demurrer,¹ and he sets up defenses of fact by answer. This must be on oath or affirmation, and must be full and explicit to each article of the libel, and it may propound interrogatories to the libelant.²

If it is not sufficiently full, the libelant may except.

An answer in admiralty has only the effect of a denial. Unlike an answer in chancery, it is not evidence in favor of respondent.³

³ Admiralty Rule 40; *SNOW v. EDWARDS*, 2 Low. 273, Fed. Cas. No. 13,145; *The Illinois*, 5 Blatchf. 256, Fed. Cas. No. 7,002; *Northrop v. Gregory*, 2 Abb. U. S. 503, Fed. Cas. No. 10,327.

⁴ *THE NEW ENGLAND*, 3 Sumn. 495, Fed. Cas. No. 10,151; *Northwestern Car Co. v. Hopkins*, 4 Biss. 51, Fed. Cas. No. 10,334; *Dexter v. Arnold*, 3 Mason, 284, Fed. Cas. No. 3,855.

§ 196. ¹ *The Cynthia*, Fed. Cas. No. 17,546a.

² Admiralty Rule 27.

³ *Cushman v. Ryan*, 1 Story, 91, Fed. Cas. No. 3,515; *Eads v. The H. D. Bacon*, Newb. Adm. 274, Fed. Cas. No. 4,232.

Things neither admitted nor denied by the answer are not taken as true, but must be proved.⁴

The defendant, in his answer, may set up want of jurisdiction of the subject-matter and a defense on the merits.⁵

Of course, he cannot plead mere want of jurisdiction over the person, and defend on the merits, as that would be a general appearance in any system of pleading.⁶

The answer, if sufficient, or if not excepted to, puts the case at issue. No replication is necessary.⁷

197. THE TRIAL.

As admiralty is not a court of terms, the case goes at once on the trial calendar, and may be called up at any time convenient to the litigants.

It is tried before the judge (there are no juries in admiralty proceedings proper), who hears the witnesses ore tenus, or, if he sees fit, appoints a commissioner to take the evidence down in writing, and report it to him later. In this matter the practice varies in the different districts. In the Eastern district of Virginia the rule requires that in cases involving over \$500 the evidence shall be ore tenus, and taken down in shorthand; and the stenographer's notes, when written out, constitute the record in the event of an appeal.

On account of the shifting character of marine witnesses, the cases are rare where all the evidence can be offered in court. In order to save the testimony of departing witnesses, or secure the testimony of nonresidents, it is usually necessary to take many depositions *de bene esse*. They are taken on notice, pursuant to the provisions of section 863,

⁴ The Dodge Healy, 4 Wash. C. C. 651, Fed. Cas. No. 2,849.

⁵ The Lindrup (D. C.) 62 Fed. 851.

⁶ Jones v. Andrews, 10 Wall. 329, 19 L. Ed. 935.

⁷ Admiralty Rule 51.

Rev. St., or the recent act permitting them to be taken as in the state courts.¹

In practice, counsel are usually liberal with each other in such matters, accepting short notice, allowing the evidence to be taken in shorthand, waiving the witnesses' signatures, and even the filing of the deposition till the hearing.

When the case comes on, it is heard and argued substantially as a chancery cause would be.

If the damages are not known or agreed to, the judge, in the event of a decision for libellant, usually refers the matter to a commissioner by an interlocutory decree to inquire into and assess the damages. Under Admiralty Rule 44 this commissioner has about the powers of a master in chancery. Those dissatisfied with his report may except to it, and upon it and such exceptions the court renders its final decree.

198. EVIDENCE.

The rules of evidence are substantially the same in the admiralty court that they are in the state courts. Section 858 of the United States Revised Statutes provides that no witness shall be excluded for color or interest, except that in actions by or against executors, administrators, or guardians neither party can testify as to transactions with the testator, intestate, or ward, unless called by the opposite party, or required to do so by the court; and that in all other respects the laws of the state shall be the rules of decision. Under this statute, husband and wife can testify for each other if the laws of the state permit it; otherwise not.¹

§ 197. ¹ 27 Stat. 7; post, p. 441.

§ 198. ¹ *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406; *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779. For the statutes regulating evidence, see post, pp. 435-441.

199. ATTACHMENTS IN ADMIRALTY.

It has been settled that the common-law and chancery courts of the United States have no jurisdiction of suits by foreign attachment against nonresidents, for the reason that by the federal statutes no man can be sued except in the district where he lives.¹

Since the last-cited decision, however, the Tucker-Culbertson act allows suits to be brought in the district of the plaintiff's residence, so that a process of foreign attachment could be sustained in such district if the defendant can be served with process.

In admiralty, however, a libel accompanied by an attachment can be sustained, as these statutes do not apply to the admiralty courts.²

There are some matters in which admiralty has its peculiar rules, to which attention should be called.

200. SET-OFF.

Set-off cannot be pleaded in admiralty for the reason that it is the creature of statutes which were passed for the common-law and chancery courts, and were not intended to apply to the admiralty courts.¹

This, however, does not prevent a counterclaim arising out of the same transaction from being used to recoup the damages.

§ 199. ¹ *Ex parte Des Moines & M. R. Co.*, 103 U. S. 794, 26 L. Ed. 461.

² *IN RE LOUISVILLE UNDERWRITERS*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991.

§ 200. ¹ *Willard v. Dorr*, 3 Mason, 91, Fed. Cas. No. 17,679; *O'Brien v. 1,614 Bags of Guano* (D. C.) 48 Fed. 726.

201. LIMITATIONS.

Admiralty is not bound by the statutes of limitation, for this same reason that they do not in terms apply to those courts. Hence, where the rights of third parties have intervened, an admiralty court will hold a claim stale in a much shorter period than that prescribed by the statutes, and we have seen in other connections that among admiralty liens of the same character the last is preferred to the first.*

But, as between the original parties, unless special circumstances have intervened, the admiralty courts adopt the statutes of limitation by analogy, the doctrine being practically the same as the chancery doctrine on the same subject.¹

202. TENDER.

In the matter of tender, admiralty is not as rigid as the other courts. A formal offer in actual cash is not de rigueur. Any offer to pay, followed up by a deposit of the amount admitted in the registry of the court, is sufficient.

203. COSTS.

In the matter of costs admiralty courts exercise a wide discretion, and often withhold them as a punishment in case the successful litigant has been guilty of oppression, or has put his opponent, by exorbitant demands, to unnecessary inconvenience or expense.¹

The act of July 20, 1892,² permits suits *in forma pauperis* without requiring security for costs. The act, if intended to

* Ante, pp. 94, 103, 345.

§ 201. ¹ *THE SARAH ANN*, 2 Sumn. 206, Fed. Cas. No. 12,342; *The Queen* (D. C.) 78 Fed. 155; *The Key City*, 14 Wall. 653, 20 L. Ed. 896.

§ 203. ¹ *Shaw v. Thompson*, Olcott, 144, Fed. Cas. No. 12,726.

² 27 Stat. 252; post, p. 441.

apply to the admiralty courts, frequently works great injustice by tying up large steamers in foreign ports till they give bond; and they are remediless if the cause of action is unfounded.

204. ENFORCING DECREES.

If, after the trial and all its incidents are over, the decision is in favor of libellant, and there is no appeal, the final decree, in case the vessel has been bonded, goes against the signers of the bond, and under Admiralty Rule 21 can be enforced by a writ of fieri facias.

In case the vessel has not been bonded, the final decree provides that she be advertised and sold by the marshal of the district, who alone, under Admiralty Rule 41, can perform this duty. The practice is to make the sale for cash, and the rule requires it to be deposited in the registry of the court, to await its further orders.

Admiralty Rule 42 requires money in the registry of the court to be drawn out by checks signed by the judge.

Under Rule 43, parties having any interest in the vessel may come in by petition, and assert it. Under this, a party holding any sort of lien may come in, but not any party having a mere personal claim upon the owner.¹

205. THE FIFTY-NINTH RULE.

A recent rule¹ permits the owner of one of two vessels which has been libeled in a collision case by a third party to bring in the other vessel if he can find her, and have the damages assessed against either or both, according to the fact.²

§ 204. ¹ The Edith, 94 U. S. 518, 24 L. Ed. 167; Leland v. Medora, 2 Woodb. & M. 92, Fed. Cas. No. 8,237; Brackett v. Hercules, Gilp. 184, Fed. Cas. No. 1,762.

§ 205. ¹ Admiralty Rule 59.

² Ante, p. 280; The Hudson, Fed. Cas. No. 6,828; Joice v. Canal Boats (D. C.) 32 Fed. 552; The Greenville (D. C.) 58 Fed. 805.

206. THE COURTS HAVING ADMIRALTY JURISDICTION.

The federal constitution vests the judicial power in one supreme court and such inferior courts as congress shall from time to time establish. Acting under this authority, congress, by the famous judiciary act of 1789, divided the United States into districts, and established in each district two courts of original jurisdiction, the district court and the circuit court. To the district court all classes of peculiar or special character were assigned, such as suits for penalties, admiralty, and bankruptcy cases, and minor criminal cases. On the circuit court was conferred the general current litigation usual between man and man, including all cases of common law and equity, and more important criminal cases. The circuit court was also given appellate jurisdiction of most of the subjects of district court cognizance, including admiralty cases.

There was a district judge appointed for each district, who was empowered to hold both the district and circuit courts for that district, except that he could not sit in the circuit court on appeals from his own decisions. To provide an appellate judge for such cases, the districts were grouped into larger units, called "circuits," equal in number to the justices of the supreme court, and each justice, during the recess of that court, went around his circuit, holding the circuit court in each district. It is unfortunate that these larger units were called "circuits," for it has tended to create confusion by making many suppose that there is a circuit court for the entire circuit, which is not the fact. The circuit courts of the different districts are as distinct from each other as the state circuit court for Rockbridge and the state circuit court for Augusta; the only thing in common being that both may be held by the same judge. The number of this circuit is the Fourth. There are circuit judges for the Fourth circuit, but there is no such thing as a circuit court

for the Fourth circuit, though there is a circuit court for the Eastern district of Virginia.

Thus appeals from the district courts in admiralty were tried in the circuit court by the supreme court justice for that circuit. The appeal took up questions both of law and fact for review, the notes of evidence taken by the district judge being the evidence on appeal; but the trial was *de novo*, being rather a new trial than an appeal, and new evidence could be introduced in the appellate court. In the event of an adverse decision in the circuit court, there was a second appeal, both on law and fact, to the supreme court, in cases involving over \$2,000.

The increase of litigation consequent on the Civil War was so great that it was found necessary to increase the judicial force, and lighten the labors of the supreme court justices. Hence, in 1869, congress enacted that there should be an additional judge appointed for each judicial circuit, to be called a "circuit judge." He could hold the circuit court in any district of his circuit.

The docket of the supreme court became more and more congested, and further relief became imperative. And so, by the act of February 16, 1875, congress raised the limit of appeals to the supreme court to \$5,000, and further provided that in admiralty there should no longer be an appeal to that court on questions both of law and fact, but that the circuit judge on an admiralty appeal from the district court should make a finding of the facts, and draw his conclusions of law therefrom; and the case then went to the supreme court simply on this finding, and no longer on all questions, both of law and fact. This, however, still left the litigant one appeal on questions of fact,—that from the district court to the circuit court.

This continued to be the law until the act of March 3, 1891, known as the "Appellate Courts Act." It created an additional circuit judge for each circuit, abolished the appellate jurisdiction of the circuit court, and established a new

appellate court in each circuit, composed of the circuit justice and the two circuit judges, but with the district judges used to fill vacancies. Under this law admiralty appeals from the district court go to this appellate court, with no restriction as to the amount involved, and on the full record of the district court, thereby nominally giving a review of questions both of law and fact. This new appellate court is the court of last resort in admiralty cases, except that it may certify to the supreme court for decision any questions as to which it may desire instruction, and except, also, that the supreme court may, by certiorari, bring up for review any cases that it may deem of sufficient importance.

207. THE PROCESS OF APPEAL.

The process of appeal is very simple. As soon as the final decree is entered in the district court, a petition is filed in that court, addressed to the judges of the circuit court of appeals, praying an appeal, and assigning errors. On this the district judge (or any judge of the appellate court) indorses: "Appeal allowed. Bond required in the penalty of \$——, conditioned according to law," and signs it. He also signs the citation, which is the notice of appeal given to the other side, and cites him to appear in the appellate court at a day named to defend his decree. A certified copy of the entire transcript is then obtained from the district clerk, and filed with the clerk of the appellate court, who docketes the case, and, when secured as to costs, has the record printed.

The act of March 3, 1891, provides that the appeal must be taken within six months from the decree complained of, "unless a lesser time is now allowed by law." As admiralty appeals, before the act, had to be taken to the next term of the then appellate court, no matter how close that was, it would seem to be clear now that appeals from the district court should be taken to the next term. This is the view that has been taken by the bar in the Eastern district of

Virginia, and it is the practice there to hold back the decree in cases decided so close to the term as to prevent maturing an appeal. But in other circuits it has been held that appeals in admiralty cases are governed by the six-months limitation, and are unaffected by the clause above quoted.¹

208. QUESTIONS OF FACT ON APPEAL.

Although the intent of congress to give an appeal on questions both of law and fact is clear, and it is notorious that the act of February 16, 1875, while it was in force, was far from satisfactory, this has been largely frittered away by judicial decisions. The appellate courts have gone very far in practically refusing to review questions of fact where the district judge has had the witnesses before him, though not so far where part or all of the evidence has been by deposition. This doctrine is largely an abdication of the trust confided in them, and, for an admiralty court, smacks too much of the old common-law fiction as to the sacredness of the jury's verdict. Under the old law giving a review on questions of law and fact the supreme court has more than once spoken of a right of appeal as something more than a shadow.¹

209. NEW EVIDENCE.

A curious feature of admiralty appeals formerly was that an admiralty appeal was a new trial. An appeal from the district to the circuit court was like one from a magistrate in the state procedure,—new witnesses could be examined, and the circuit court entered its own decree, and issued its

§ 207. ¹ The New York, 44 C. C. A. 38, 104 Fed. 561.

§ 208. ¹ Post v. Jones, 19 How. 150, 15 L. Ed. 618; THE ARIADNE, 13 Wall. 475, 20 L. Ed. 542; The City of Hartford, 97 U. S. 323, 24 L. Ed. 930; The Gypsum Prince, 14 C. C. A. 573, 67 Fed. 612; The Glendale, 26 C. C. A. 500, 81 Fed. 633; The Albany, 27 C. C. A. 28, 81 Fed. 966; The Captain Weber, 32 C. C. A. 452, 89 Fed. 957.

own execution, instead of remanding the case to the district court for future proceedings.

Even an appeal from the circuit to the supreme court was so far a new trial that additional witnesses could be examined, but the supreme court restricted this right by rule to evidence which could not have been produced in the lower courts, and required it to be taken by deposition. In other words, they discouraged the practice as much as possible on account of its obvious injustice and liability to abuse.¹

The new appellate courts have adopted substantially the same doctrine. In case an appeal is taken up with a record not containing the evidence, they will not review the facts at all.²

In the case of *The Glide*,³ a case was tried in the district court of Maryland, the witnesses being examined *ore tenus*, but there was no rule in that district requiring their testimony to be taken down, and it was not taken down. The unsuccessful party appealed, and asked for a commission to retake his testimony for use on appeal. The court permitted it, on the ground that it was not his fault if the district court rule did not provide for such a case. The court, after arguing out his right to retake his testimony, ended its opinion by saying that the case must not be taken as a precedent, and any party who omitted or neglected to have his testimony taken down must suffer the consequences. So it sounds very much like a verdict of "Not guilty, but don't do it again."

The fact that there was no rule requiring it was not much of an excuse. In the common-law courts there is no rule or statute requiring evidence to be preserved for the purpose of preparing bills of exceptions, but the lawyer who gave that as an excuse for not setting out the evidence in his bill would receive scant consideration from a judge.

§ 209. ¹ *The Mabey*, 10 Wall. 419, 19 L. Ed. 963.

² *The Philadelphian*, 9 C. C. A. 54, 60 Fed. 423.

³ 18 C. C. A. 504, 72 Fed. 200.

The well-known characteristics of sailor witnesses, and the utter lack of any check on them in case their testimony is not in black and white, especially after they have found out by hearing the arguments in the first trial how their case should be strengthened, render the procedure permitted in this case one of the gravest danger.⁴

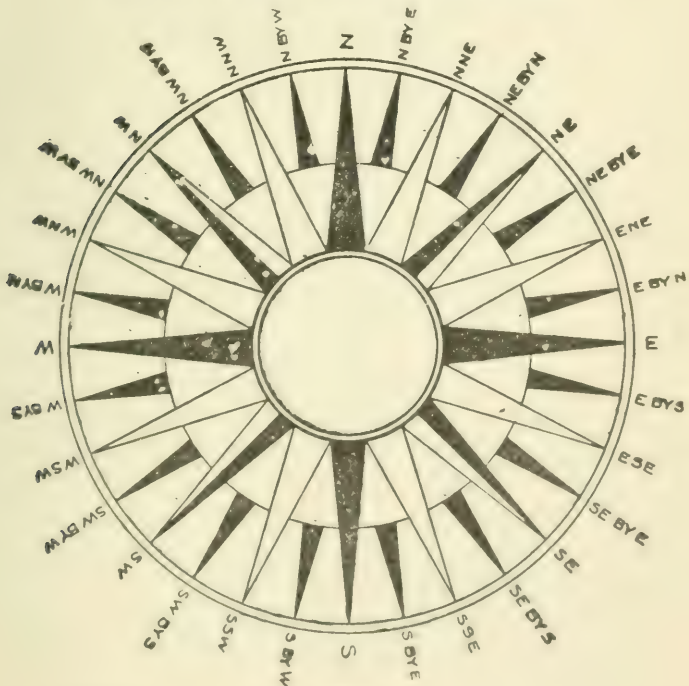
Under the present law the appellate court remands the case to the district court for final action, instead of entering its own decree, as the old circuit court did.

⁴ *Taylor v. Harwood*, Taney, 437, Fed. Cas. No. 13,794.

APPENDIX.

1. The Mariner's Compass.
2. Statutes Regulating Navigation, Including:
 - (1) The International Rules.
 - (2) The Rules for Coast and Connecting Inland Waters.
 - (3) The Dividing Lines between the High Seas and Coast Waters.
 - (4) The Lake Rules.
 - (5) The Mississippi Valley Rules.
 - (6) The Act of March 3, 1899, as to Obstructing Channels.
3. The Limited Liability Acts, Including:
 - (1) The Act of March 3, 1851, as Amended.
 - (2) The Act of June 26, 1884.
4. Section 941, Rev. St., as Amended, Regulating Bonding of Vessels.
5. Statutes Regulating Evidence in the Federal Courts.
6. Suits in Forma Pauperis.
7. The Admiralty Rules of Practice.

1. THE MARINER'S COMPASS.



2. THE RULES OF NAVIGATION.

In addition to the statute books, these are accessible in various publications of the bureau of navigation. These circulars, however, have added captions, not contained in the original acts, and have even changed the original captions in some places. Both have been retained in the acts printed below, as they greatly facilitate reference; but those captions which are not a part of the act are placed in brackets, so as to distinguish them from those that are.

Besides the statute rules, the board of supervising inspectors has authority to make regulations supplementary thereto; and there are elaborate rules made by virtue of this authority, both for the Coast Waters, the Lakes and the Mississippi Valley. These are omitted for want of space, and because they are constantly being changed.

(1) INTERNATIONAL RULES. (29 STAT. 885.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by seagoing vessels.

PRELIMINARY.

In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam-vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way" within the meaning of these rules when she is not at anchor, or made fast to the shore, or aground.

RULES CONCERNING LIGHTS AND SO FORTH.

The word "visible" in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere.

Article 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

[Steam vessels—Masthead light.]

Art. 2. A steam-vessel when under way shall carry—(a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

[Steam vessels—Side lights.]

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

[Steam vessels—Range lights.]

(e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

[Steam-vessels when towing.]

Art. 3. A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than six feet apart, and when towing more than one vessel shall carry an additional bright white light six feet above or below such light, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a), excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull.

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

[Special lights.]

Art. 4. (a) A vessel which from any accident is not under command shall carry at the same height as a white light mentioned in article two (a), where they can best be seen, and if a steam-vessel in lieu of that light, two red lights, in

a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all around the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter.

(b) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in article two (a), and if a steam-vessel in lieu of that light, three lights in a vertical line one over the other not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all around the horizon, at a distance of at least two miles. By day she shall carry in a vertical line, one over the other, not less than six feet apart, where they can best be seen, three shapes not less than two feet in diameter, of which the highest and lowest shall be globular in shape and red in color, and the middle one diamond in shape and white.

(c) The vessels referred to in this article, when not making way through the water, shall not carry the side-lights, but when making way shall carry them.

(d) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and can not therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in article thirty-one.

[Lights for sailing vessels and vessels in tow.]

Art. 5. A sailing-vessel under way and any vessel being towed shall carry the same lights as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

[Lights for small vessels.]

Art. 6. Whenever, as in the case of small vessels under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens.

[Lights for small steam and sail vessels and open boats.]

(As Amended 28 Stat. 82.)

Art. 7. Steam-vessels of less than forty, and vessels under oars or sails of less than twenty tons gross tonnage, respectively, and rowing boats, when under way, shall not be required to carry the lights mentioned in article two (a), (b), and (c), but if they do not carry them they shall be provided with the following lights:

First. Steam-vessels of less than forty tons shall carry—

(a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in article two (a), and of such a character as to be visible at a distance of at least two miles.

(b) Green and red side-lights constructed and fixed as prescribed in article two (b) and (c), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective

sides. Such lanterns shall be carried not less than three feet below the white light.

Second. Small steamboats, such as are carried by sea-going vessels, may carry the white light at a less height than nine feet above the gunwale, but it shall be carried above the combined lantern mentioned in subdivision one (b).

Third. Vessels under oars or sails of less than twenty tons shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

Fourth. Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision.

The vessels referred to in this article shall not be obliged to carry the lights prescribed by article four (a) and article eleven, last paragraph.

[Lights for pilot vessels.]

(As Amended February 19, 1900, 31 Stat. 30.)

Art. 8. Pilot-vessels when engaged on their station on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white

light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with green glass on the one side and red glass on the other, to be used as prescribed above.

Pilot-vessels when not engaged on their station on pilotage duty shall carry lights similar to those of other vessels of their tonnage.

That a steam pilot-vessel, when engaged on her station on pilotage duty and in waters of the United States, and not at anchor, shall, in addition to the lights required for all pilot-boats, carry at a distance of eight feet below her white masthead light a red light, visible all around the horizon and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and also the colored side-lights required to be carried by vessels when under way.

When engaged on her station on pilotage duty and in waters of the United States, and at anchor, she shall carry in addition to the lights required for all pilot-boats the red light above mentioned, but not the colored side-lights.

When not engaged on her station on pilotage duty, she shall carry the same lights as other steam vessels.

[Lights, etc., of fishing vessels.]

Art. 9. [Article nine, act of August 19, 1890, was repealed by act of May 28, 1894, and article 10, act of March 3, 1885, was re-enacted in part by act of August 13, 1894, and is reproduced here in part as article 9. See 28 Stat. 83, 281.]

Fishing-vessels of less than twenty tons net registered tonnage, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the colored side-lights; but every such vessel shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent

collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

[Lights for fishing vessels off European coasts.]

The following portion of this article applies only to fishing-vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre:

(a) All fishing-vessels and fishing-boats of twenty tons net registered tonnage or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way.

(b) All vessels when engaged in fishing with drift-nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet, and so that the horizontal distance between them, measured in a line with the keel of the vessel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character and contained in lanterns of such construction as to show all round the horizon, on a dark night, with a clear atmosphere, for a distance of not less than three miles.

(c) All vessels when trawling, dredging, or fishing with any kind of drag-nets shall exhibit, from some part of the vessel where they can be best seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and contained in lanterns of such construction as to be visible all round the horizon, on a dark night, with a clear atmosphere, the white light to a distance of not less than three miles, and the red light of not less than two miles.

(d) A vessel employed in line-fishing, with her lines out, shall carry the same lights as a vessel when engaged in fishing with drift-nets.

(e) If a vessel, when fishing with a trawl, dredge, or any kind of drag-net, becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog-signal for a vessel at anchor.

(f) Fishing-vessels may at any time use a flare-up in addition to the lights which they are by this article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag-net shall be shown at the after-part of the vessel, excepting that if the vessel is hanging by the stern to her trawl, dredge, or drag-net, they shall be exhibited from the bow.

(g) Every fishing-vessel when at anchor between sunset and sunrise shall exhibit a white light, visible all round the horizon at a distance of at least one mile.

(h) In a fog a drift-net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag-net, and a vessel employed in line-fishing with her lines out, shall, at intervals of not more than two minutes, make a blast with her fog-horn and ring her bell alternately.

[Lights for an overtaken vessel.]

Art. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of twelve points of the compass, namely, for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side lights.

[Anchor lights.]

Art. 11. A vessel under one hundred and fifty feet in length when at anchor shall carry forward where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fair-way shall carry the above light or lights and the two red lights prescribed by article four (a).

[Special signals.]

Art. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that can not be mistaken for a distress signal.

[Naval lights and recognition signals.]

Art. 13. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal-lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship-owners, which have been authorized by their respective governments and duly registered and published.

[Steam vessel under sail by day.]

Art. 14. A steam-vessel proceeding under sail only but having her funnel up, shall carry in day-time, forward, where it can best be seen, one black ball or shape two feet in diameter.

SOUND SIGNALS FOR FOG, AND SO FORTH**[Preliminary.]**

(As Amended 29 Stat. 381.)

Art. 15. All signals prescribed by this article for vessels under way shall be given:

First. By "steam vessels" on the whistle or siren.

Second. By "sailing vessels" and "vessels towed" on the fog horn.

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds' duration.

A steam-vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn, to be sounded by mechanical means, and also with an efficient bell. (In all cases where the rules require a bell to be used a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small sea-going vessels.) A sailing vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rain-storms, whether by day or night, the signals described in this article shall be used as follows, namely:

[Steam vessel under way.]

(a) A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

(b) A steam vessel under way, but stopped, and having no way upon her, shall sound, at intervals of not more than two

minutes, two prolonged blasts, with an interval of about one second between.

[Sail vessel under way.]

(c) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

[Vessels at anchor or not under way.]

(d) A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

[Vessels towing or towed.]

(e) A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to maneuver as required by the rules, shall, instead of the signals prescribed in subdivisions (a) and (c) of this article, at intervals of not more than two minutes, sound three blasts in succession, namely: One prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

[Small sailing vessels and boats.]

Sailing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals, but, if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

Speed of ships to be moderate in fog, and so forth.

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard for the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascer-

tained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

STEERING AND SAILING RULES.

Preliminary—Risk of collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

[Sailing vessels.]

Art. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.

[Steam vessels.]

Art. 18. When two steam-vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which

must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side-lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

[Two steam-vessels crossing.]

Art. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

[Steam-vessel shall keep out of the way of sailing-vessel.]

Art. 20. When a steam-vessel and a sailing-vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel.

[Course and speed.]

(As Amended 28 Stat. 83.)

Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

[Crossing ahead.]

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

[Steam-vessel shall slacken speed or stop.]

Art. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

[Overtaking vessels.]

Art. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

[Narrow channels.]

Art. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.

[Right of way of fishing vessels.]

Art. 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or

trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing vessels or boats.

[General prudential rule.]

Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Sound signals for vessels in sight of one another.

Art. 28. The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam-vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "My engines are going at full speed astern."

No vessel, under any circumstances, to neglect proper precautions.

Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of rules for harbors and inland navigation.

Art. 30. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland waters.

Distress signals.**(As Amended 28 Stat. 83.)**

Art. 31. When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

In the daytime—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. The international code signal of distress indicated by N C.

Third. The distance signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball.

Fourth. A continuous sounding with any fog-signal apparatus.

At night—

First. A gun or other explosive signal fired at intervals of about a minute.

Second. Flames on the vessel (as from a burning tar barrel, oil barrel and so forth).

Third. Rockets or shells throwing stars of any color or description, fired one at a time, at short intervals.

Fourth. A continuous sounding with any fog-signal apparatus.

Sec. 2. That all laws or parts of laws inconsistent with the foregoing regulations for preventing collisions at sea for the navigation of all public and private vessels of the United States upon the high seas and in all waters connected therewith navigable by sea-going vessels are hereby repealed.

(2) INLAND RULES. (30 STAT. 96.)

An act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States.

Whereas the provisions of chapter eight hundred and two of the Laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea [i. e. International rules supra], apply to all waters of the United States connected with the high seas navigable by sea-going vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and

Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one act: Therefore,

Be it enacted by the senate and house of representatives of the United States of America in Congress assembled, that the following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and are hereby declared special rules duly made by local authority:

PRELIMINARY.

In the following rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam-vessel.

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way," within the meaning of these rules, when she is not at anchor, or made fast to the shore, or aground.

RULES CONCERNING LIGHTS AND SO FORTH.

The word "visible" in these rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere.

Article 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

[Steam vessels—Masthead light.]

Art. 2. A steam-vessel when under way shall carry—(a) On or in the front of the foremast, or, if a vessel without a foremast, then in the fore part of the vessel, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

[Steam vessels—Side lights.]

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

[Steam vessels—Range lights.]

(e) A sea-going steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance. (f) All steam-vessels (except sea-going vessels and ferry-boats), shall carry in addition to green and red lights required by article two (b), (c), and screens as required by article two (d), a central range of two white lights; the after-light being carried at an elevation at least fifteen feet above the light at the head of the vessel. The head-light shall be so constructed as to show an unbroken light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel, and the after-light so as to show all around the horizon.

[Steam-vessels when towing.]

Art. 3. A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, and when towing more than one vessel shall carry an additional bright white light three feet above or below such lights, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a) or the after range light mentioned in article two (f).

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

[Lights for sailing vessels and vessels in tow.]

Art. 5. A sailing-vessel under way or being towed shall carry the same lights as are prescribed by article two for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

[Lights for small vessels.]

Art. 6. Whenever, as in the case of vessels of less than ten gross tons under way during bad weather, the green and red side-lights can not be fixed, these lights shall be kept at hand, lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the star-board side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with proper screens.

Art. 7. Rowing boats, whether under oars or sail, shall have ready at hand a lantern showing a white light which shall be temporarily exhibited in sufficient time to prevent collision.

[Lights for pilot vessels.]

(As Amended February 19, 1900, 31 Stat. 30.)

Art. 8. Pilot-vessels when engaged on their stations on pilotage duty shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side nor the red light on the starboard side.

A pilot-vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the colored lights above mentioned, have at hand, ready for use, a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage.

That a steam pilot vessel, when engaged on her station on pilotage duty and in waters of the United States, and not at anchor, shall, in addition to the lights required for all pilot boats, carry at a distance of eight feet below her white masthead light a red light, visible all around the horizon and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles, and also the colored side lights required to be carried by vessels when under way.

When engaged on her station on pilotage duty and in waters of the United States, and at anchor, she shall carry in addition to the lights required for all pilot boats the red light above mentioned, but not the colored side lights.

When not engaged on her station on pilotage duty, she shall carry the same lights as other steam vessels.

[Lights, etc., of fishing vessels.]

Art. 9. (a) Fishing-vessels of less than ten gross tons, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the colored side-lights; but every such vessel shall, in lieu

thereof, have ready at hand a lantern with a green glass on one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

(b) All fishing-vessels and fishing-boats of ten gross tons or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way.

(c) All vessels, when trawling, dredging, or fishing with any kind of drag-nets or lines, shall exhibit, from some part of the vessel where they can be best seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and contained in lanterns of such construction as to be visible all around the horizon, the white light a distance of not less than three miles and the red light of not less than two miles.

[Lights for rafts, or other craft, not provided for.]

(d) Rafts, or other water craft not herein provided for, navigating by hand power, horse power, or by the current of the river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam vessels.

[Lights for an overtaken vessel.]

Art. 10. A vessel which is being overtaken by another, except a steam-vessel with an after range-light showing all around the horizon, shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

[Anchor lights.]

Art. 11. A vessel under one hundred and fifty feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length when at anchor shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

[Special signals.]

Art. 12. Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.

[Naval lights and recognition signals.]

Art. 13. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by shipowners, which have been authorized by their respective governments, and duly registered and published.

[Steam vessel under sail by day.]

Art. 14. A steam-vessel proceeding under sail only, but having her funnel up, may carry in daytime, forward, where it can best be seen, one black ball or shape two feet in diameter.

SOUND SIGNALS FOR FOG, AND SO FORTH.**[Preliminary.]**

Art. 15. All signals prescribed by this article for vessels under way shall be given:

1. By "steam-vessels" on the whistle or siren.
2. By "sailing-vessels" and "vessels towed" on the fog horn.

The words "prolonged blast" used in this article shall mean a blast of from four to six seconds duration.

A steam-vessel shall be provided with an efficient whistle or siren, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn; also with an efficient bell. A sailing-vessel of twenty tons gross tonnage or upward shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

[Steam vessel under way.]

- (a) A steam-vessel under way shall sound, at intervals of not more than one minute, a prolonged blast.

[Sail vessel under way.]

- (c) A sailing vessel under way shall sound, at intervals of not more than one minute, when on the starboard tack, one blast; when on the port tack, two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

[Vessels at anchor or not under way.]

- (d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds.

[Vessels towing or towed.]

- (e) A steam-vessel when towing, shall, instead of the signals prescribed in subdivision (a) of this article, at in-

tervals of not more than one minute, sound three blasts in succession, namely, one prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

[Rafts or other craft not provided for.]

(f) All rafts or other water craft, not herein provided for, navigating by hand power, horse power, or by the current of the river, shall sound a blast of the fog-horn, or equivalent signal, at intervals of not more than one minute.

[Speed of ships to be moderate in fog and so forth.]

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

STEERING AND SAILING RULES.

Preliminary—Risk of collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

[Sailing vessels.]

Art. 17. When two sailing-vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.

[**Steam vessels.**]

Art. 18. Rule I. When steam-vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light,

is seen ahead, or where both green and red lights are seen anywhere but ahead.

Rule III. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle.

Rule V. Whenever a steam-vessel is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steam-vessel approaching from the opposite direction can not be seen for a distance of half a mile, such steam-vessel, when she shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam-whistle, which signal shall be answered by a similar blast, given by any approaching steam-vessel that may be within hearing. Should such signal be so answered by a steam-vessel upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such vessel be not answered, she is to consider the channel clear and govern herself accordingly.

When steam-vessels are moved from their docks or berths, and other boats are liable to pass from any direction toward them, they shall give the same signals as in the case of vessels meeting at a bend, but immediately after clearing the berths so as to be fully in sight they shall be governed by the steering and sailing rules.

Rule VIII. When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put

her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.

Rule IX. The whistle signals provided in the rules under this article, for steam-vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow or heavy rainstorms, when vessels can not see each other, fog-signals only must be given.

[Two steam-vessels crossing.]

Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

[Steam-vessel shall keep out of the way of sailing-vessel.]

Art. 20. When a steam-vessel and sailing-vessel are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing-vessel.

[Course and speed.]

Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

[Crossing ahead.]

Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

[Steam-vessel shall slacken speed or stop.]

Art. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

[Overtaking vessels.]

Art. 24. Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

[Narrow channels.]

Art. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.

[Rights of way of fishing vessels.]

Art. 26. Sailing-vessels under way shall keep out of the way of sailing-vessels or boats fishing with nets, or lines or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fair-way used by vessels other than fishing-vessels or boats.

[General prudential rule.]

Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Sound signals for vessels in sight of one another.

Art. 28. When vessels are in sight of one another a steam-vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle.

No vessel under any circumstances to neglect proper precautions.

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

[Lights on United States naval vessels and revenue cutters.]

Art. 30. The exhibition of any light on board of a vessel of war of the United States or a revenue cutter may be suspended whenever, in the opinion of the secretary of the navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.

Distress signals.

Art. 31. When a vessel is in distress and requires assistance from other vessels or from the shore the following shall be the signals to be used or displayed by her, either together or separately, namely:

In the daytime.

A continuous sounding with any fog-signal apparatus, or firing a gun.

At night.

First. Flames on the vessel as from a burning tar barrel, oil barrel and so forth.

Second. A continuous sounding with any fog-signal apparatus, or firing a gun.

[Supervising inspectors' rules.]

Sec. 2. That the supervising inspectors of steam-vessels and the supervising inspector-general shall establish such rules to be observed by steam-vessels in passing each other and as to the lights to be carried by ferry-boats and by barges and canal-boats when in tow of steam-vessels, not inconsistent with the provisions of this act, as they from time to time may deem necessary for safety, which rules, when approved by the secretary of the treasury, are hereby declared special rules duly made by local authority, as provided for in article thirty of chapter eight hundred and two of the laws of eighteen hundred and ninety. Two printed copies of such rules shall be furnished to such ferry-boats and steam-vessels, which rules shall be kept posted up in conspicuous places in such vessels.

[Penalty.]

Sec. 3. That every pilot, engineer, mate, or master of any steam-vessel, and every master or mate of any barge or canal-boat, who neglects or refuses to observe the provisions of this act, or the regulations established in pursuance of the preceding section, shall be liable to a penalty of fifty dollars, and for all damages sustained by any passenger in his person or baggage by such neglect or refusal: provided, that nothing herein shall relieve any vessel, owner, or corporation from any liability incurred by reason of such neglect or refusal.

Sec. 4. That every vessel that shall be navigated without complying with the provisions of this act shall be liable to a penalty of two hundred dollars, one-half to go to the informer, for which sum the vessel so navigated shall be liable and may be seized and proceeded against by action in any district court of the United States having jurisdiction of the offense.

[Repeal of former acts.]

Sec. 5. That sections forty-two hundred and thirty-three and forty-four hundred and twelve (with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries, and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal), and forty-four hundred and thirteen of the Revised Statutes of the United States, and chapter two hundred and two of the laws of eighteen hundred and ninety-three, and sections one and three of chapter one hundred and two of the laws of eighteen hundred and ninety-five, and sections five, twelve, and thirteen of the act approved March third, eighteen hundred and ninety-seven, entitled "An act to amend the laws relating to navigation," and all amendments thereto, are hereby repealed so far as the harbors, rivers, and inland waters aforesaid (except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the Red River of the North, and rivers emptying into the Gulf of Mexico, and their tributaries) are concerned.

Sec. 6. That this act shall take effect four months from the date of its approval.

Approved, June 7, 1897.

(3) LINES BETWEEN INTERNATIONAL AND INLAND RULES.

Lines establishing harbors, rivers, and inland waters of the United States, within which the inland rules are to apply.

[Bearings are magnetic and given approximately.]

New York Harbor.—From Navesink (southerly) Light House NE. $\frac{5}{8}$ E., easterly, to Scotland Light Vessel; thence NNE. $\frac{1}{2}$ E. through Gedney Channel Whistling Buoy to Rockaway Point Life-Saving Station.

Baltimore Harbor and Chesapeake Bay.—From Cape Henry Light House NE. by E. $\frac{3}{4}$ E., easterly, to Outer Entrance Whistling Buoy; thence N. by E. $\frac{3}{8}$ E. to Cape Charles Light House.

Galveston Harbor.—From Galveston Bar Whistling Buoy N. by W. $\frac{3}{4}$ W. through the beacon marking the outer extremity of the N. jetty, and SW. by W. $\frac{1}{2}$ W. westerly, through North Breaker Beacon.

Boston Harbor.—From Point Allerton NNE. $\frac{1}{4}$ E., easterly, through Point Allerton Beacon to Northeast Grave Whistling Buoy; thence NNE. $\frac{1}{4}$ E. to Outer Breaker (Great Pig Rocks) Bell Buoy; thence NE. by E. $\frac{3}{8}$ E. to Halfway Rock Beacon; thence NE. by E. $\frac{1}{4}$ E. to Eastern Point Light House.

San Francisco Harbor.—From Point Bonita Light House SE. $\frac{7}{8}$ S. to Point Lobos.

Philadelphia Harbor and Delaware Bay.—From Cape Henlopen Light House NE. by E. to South Shoal Whistling Buoy; thence NNE. $\frac{1}{4}$ E. to Cape May Light House.

Charleston Harbor.—From Charleston Light Vessel NW. $\frac{1}{2}$ W. (toward Sullivans Island Range Rear Light) to the North Jetty, and from Charleston Light Vessel SW. $\frac{1}{8}$ W. to Charleston Whistling Buoy; thence SW. $\frac{7}{8}$ W. to Charles-

ton Main Channel Entrance Bell Buoy; thence W. to Folly Island.

Savannah Harbor and Calibogue Sound.—From Tybee Whistling Buoy NNW. $15/16$ W. through North Slue Channel Outer Buoy to Braddock Point, Hilton Head Island, and from Tybee Whistling Buoy W. to Tybee Island.

St. Simon Sound (Brunswick Harbor) and St. Andrew Sound.—From hotel on beach of St. Simon Island $15/16$ mile NE. by E. $1/4$ E. from St. Simon Light House, SE. $7/8$ E. to St. Simon Sea Buoy; thence S. $1/4$ E. to St. Andrew's Sound Sea Buoy; thence W. to the Shore of Little Cumberland Island.

Pensacola Harbor.—From Pensacola Entrance Whistling Buoy N. $7/8$ W., a tangent to the E. side of Fort Pickens, to the shore of Santa Rose Island, and from the Whistling Buoy NW. $2/16$ W. to Fort McRee Range Front Light.

Mobile Harbor and Bay.—From Mobile Bay Outer or Deep Sea Whistling Buoy (or its watch buoy in summer) NE. by N. to the shore of Mobile Point, and from the Whistling Buoy NW. by W. to the shore of Dauphin Island.

New Orleans Harbor and the Delta of the Mississippi.—From South Pass East Jetty Light House N. by E. $1/2$ E. to Pass a Loutre Light House; thence N. to Errol Island and from South Pass East Jetty Light House W. $7/8$ S. to Southwest Pass Light House; thence N. to shore.

San Diego Harbor.—From Point Loma Light House S. $7/8$ E. to San Diego Bay Outside Bar Whistling Buoy; thence NNE. $7/8$ E. to tower of Coronado Hotel.

Columbia River Entrance.—From Cape Disappointment Light House SE. $7/8$ E. to Point Adams Light House.

Cutler (Little River) Harbor, Me.—A line drawn from Long Point SW. by W. $3/4$ W. to Little River Head.

Little Machias Bay, Machias Bay, Englishman Bay, Chandler Bay, Moosabec Reach, Pleasant Bay, Narraguagus Bay, and Pigeon Hill Bay, Me.—A line drawn from Little River Head WSW. $1/4$ W. to the outer side of Old Man; thence

WSW. $\frac{3}{8}$ W. to the outer side of Double Shot Islands; thence W. $\frac{3}{4}$ S. to Libby Islands Light House; thence WSW. $\frac{1}{4}$ W. to Moose Peak Light House; thence WSW. $\frac{1}{4}$ W. to Little Pond Head; from Pond Point, Great Wass Island, W. by S. to outer side of Crumple Island; thence W. $\frac{3}{8}$ S. to Petit Manan Light House.

All Harbors on the Coasts of Maine, New Hampshire, and Massachusetts Between Petit Manan Light House, Me., and Cape Ann Light Houses, Mass.—A line drawn from Petit Manan Light House SW. $\frac{3}{8}$ S., $26\frac{1}{2}$ miles, to Mount Desert Light House; thence W. $\frac{3}{8}$ S., $33\frac{1}{2}$ miles, to Martinicus Rock Light Houses; thence WNW. $\frac{7}{8}$ W., 20 miles, to Monhegan Island Light House; thence W., 21 miles, to Seguin Island Whistling Buoy; thence W. $\frac{3}{4}$ S., 19 miles, to Old Anthony Whistling Buoy, off Cape Elizabeth; thence SW., 28 miles, to Boon Island Light House; thence SW. $\frac{1}{8}$ W., 12 miles, to Anderson Ledge Spindle, off Isles of Shoals Light House; thence S. by W. $\frac{1}{4}$ W., $19\frac{1}{2}$ miles, to Cape Ann Light Houses, Mass. (Lines heretofore established for Portland Harbor, and Kittery Harbor, Me., Portsmouth Harbor, N. H., Newburyport, Ipswich and Annisquam Harbors, Mass., are hereby canceled.)

All Harbors in Cape Cod Bay, Mass.—A line drawn from Plymouth (Gurnet) Light Houses E., $16\frac{1}{4}$ miles, to Race Point Light House.

Nantucket Sound, Vineyard Sound, Buzzards Bay, Narragansett Bay, Block Island Sound, and Easterly Entrance to Long Island Sound.—A line drawn from Chatham Light Houses, Mass., S. by E. $\frac{3}{8}$ E., about 6 miles, to Northeast Slue Channel Whistling Buoy (Pollock Rip); thence S. by W. $\frac{5}{8}$ W., about 11 miles, to Great Round Shoal Light Vessel; thence SSW. $\frac{5}{8}$ W., $7\frac{5}{8}$ miles, to Sankaty Head Light House; from the westerly end of Tuckernuck Island NW. by W. $\frac{1}{2}$ W., about $5\frac{1}{2}$ miles, to Wasque Point, Chappaquiddick Island; from Gay Head Light House W. $\frac{3}{4}$ S., 35 miles, to Block Island (SE.) Light House; thence W. $\frac{3}{4}$ S., 15 miles,

to Montauk Point Light House, on the easterly end of Long Island, N. Y.

St. Johns River, Florida.—A straight line from the outer end of the northerly jetty to the outer end of the southerly jetty.

[Additions to these lines will be made from time to time.]

(4) LAKE RULES. (28 STAT. 645.)

An act to regulate navigation on the Great Lakes and their connecting and tributary waters.

[PRELIMINARY.]

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the following rules for preventing collisions shall be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal.

Steam and sail vessels.

Rule 1. Every steam vessel which is under sail and not under steam, shall be considered a sail vessel; and every steam vessel which is under steam, whether under sail or not, shall be considered a steam vessel. The word steam vessel shall include any vessel propelled by machinery. A vessel is under way within the meaning of these rules when she is not at anchor or made fast to the shore or aground.

LIGHTS.

Rule 2. The lights mentioned in the following rules and no others shall be carried in all weathers from sunset to sunrise. The word visible in these rules when applied to lights shall mean visible on a dark night with a clear atmosphere.

Rule 3. Except in the cases hereinafter expressly provided for, a steam vessel when under way shall carry:

(a) On or in front of the foremast, or if a vessel without a foremast, then in the forepart of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet, then at a height above the hull not less than such beam, so, however, that such height need not exceed forty feet, a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side, and of such character as to be visible at a distance of at least five miles.

(b) On the starboard side, a green light, so constructed as to throw an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

(c) On the port side, a red light, so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red lights shall be fitted with in-board screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steamer of over one hundred and fifty feet register length shall also carry when under way an additional bright light similar in construction to that mentioned in subdivision (a), so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least three miles. Such additional light shall be placed in line with the keel at least fifteen feet higher from the deck and more than seventy-five feet abaft the light mentioned in subdivision (a).

Vessels towing.

Rule 4. A steam vessel having a tow other than a raft shall in addition to the forward bright light mentioned in subdivision (a) of rule three carry in a vertical line not less than six feet above or below that light a second bright light of the same construction and character and fixed and carried in the same manner as the forward bright light mentioned in said subdivision (a) of rule three. Such steamer shall also carry a small bright light abaft the funnel or after mast for the tow to steer by, but such light shall not be visible forward of the beam.

Rule 5. A steam vessel having a raft in tow shall, instead of the forward lights mentioned in rule four, carry on or in front of the foremast, or if a vessel without a foremast then in the forepart of the vessel, at a height above the hull of not less than twenty feet, and if the beam of the vessel exceeds twenty feet, then at a height above the hull not less than such beam, so however that such height need not exceed forty feet, two bright lights in a horizontal line athwartships and not less than eight feet apart, each so fixed as to throw the light all around the horizon and of such character as to be visible at a distance of at least five miles. Such steamer shall also carry the small bright steering light aft, of the character and fixed as required in rule four.

[Lights for vessels towed.]

Rule 6. A sailing vessel under way and any vessel being towed shall carry the side lights mentioned in rule three.

A vessel in tow shall also carry a small bright light aft, but such light shall not be visible forward of the beam.

[Lights for tugs and for ferryboats, rafts, canal boats, and boats on the St. Lawrence.]

Rule 7. The lights for tugs under thirty tons register whose principal business is harbor towing, and for boats navigating only on the river Saint Lawrence, also ferryboats,

rafts, and canal boats, shall be regulated by rules which have been or may hereafter be prescribed by the board of supervising inspectors of steam vessels.

[Lights for small vessels.]

Rule 8. Whenever, as in the case of small vessels under way during bad weather, the green and red side lights can not be fixed, these lights shall be kept at hand lighted and ready for use, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

[Lights for vessels at anchor.]

Rule 9. A vessel under one hundred and fifty feet register length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern constructed so as to show a clear, uniform, and unbroken light, visible all around the horizon, at a distance of at least one mile.

A vessel of one hundred and fifty feet or upward in register length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

**[Lights for produce boats and craft on bays, harbors,
and rivers.]**

Rule 10. Produce boats, canal boats, fishing boats, rafts, or other water craft navigating any bay, harbor, or river

by hand power, horse power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not otherwise provided for in these rules, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam vessels.

[Lights for open boats.]

Rule 11. Open boats shall not be obliged to carry the side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white light. They shall not, however, be prevented from using a flare-up in addition if considered expedient.

[Lighted torch.]

Rule 12. Sailing vessels shall at all times, on the approach of any steamer during the nighttime, show a lighted torch upon that point or quarter to which such steamer shall be approaching.

[Lights on vessels of war, etc.]

Rule 13. The exhibition of any light on board of a vessel of war or revenue cutter of the United States may be suspended whenever, in the opinion of the secretary of the navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.

FOG SIGNALS.

Rule 14. A steam vessel shall be provided with an efficient whistle, sounded by steam or by some substitute for steam,

placed before the funnel not less than eight feet from the deck, or in such other place as the local inspectors of steam vessels shall determine, and of such character as to be heard in ordinary weather at a distance of at least two miles, and with an efficient bell, and it is hereby made the duty of the United States local inspectors of steam vessels when inspecting the same to require each steamer to be furnished with such whistle and bell. A sailing vessel shall be provided with an efficient fog horn and with an efficient bell.

Whenever there is thick weather by reason of fog, mist, falling snow, heavy rainstorms, or other causes, whether by day or by night, fog signals shall be used as follows:

(a) A steam vessel under way, excepting only a steam vessel with raft in tow, shall sound at intervals of not more than one minute three distinct blasts of her whistle.

(b) Every vessel in tow of another vessel shall, at intervals of one minute, sound four bells on a good and efficient and properly placed bell as follows: By striking the bell twice in quick succession, followed by a little longer interval, and then again striking twice in quick succession (in the manner in which four bells is struck in indicating time.)

(c) A steamer with a raft in tow shall sound at intervals of not more than one minute a screeching or Modoc whistle for from three to five seconds.

(d) A sailing vessel under way and not in tow shall sound at intervals of not more than one minute—

If on the starboard tack with wind forward of abeam, one blast of her fog horn;

If on the port tack with wind forward of the beam, two blasts of her fog horn;

If she has the wind abaft the beam on either side, three blasts of her fog horn.

(e) Any vessel at anchor and any vessel aground in or near a channel or fairway shall at intervals of not more than two minutes ring the bell rapidly for three to five seconds.

(f) Vessels of less than ten tons registered tonnage, not

being steam vessels, shall not be obliged to give the above-mentioned signals, but if they do not they shall make some other efficient sound signal at intervals of not more than one minute.

(g) Produce boats, fishing boats, rafts, or other water craft navigating by hand power or by the current of the river, or anchored or moored in or near the channel or fairway and not in any port, and not otherwise provided for in these rules, shall sound a fog horn, or equivalent signal, at intervals of not more than one minute.

[Moderate speed in thick weather.]

Rule 15. Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other.

STEERING AND SAILING RULES.

Sailing vessels.

Rule 16. When two sailing vessels are approaching one another so as to involve risk of collision one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is closehauled.

(b) A vessel which is closehauled on the port tack shall keep out of the way of a vessel which is closehauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When they are running free, with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

Steam vessels.

Rule 17. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision each shall alter her course to starboard, so that each shall pass on the port side of the other.

Rule 18. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other.

Rule 19. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision the steam vessel shall keep out of the way of the sailing vessel.

Rule 20. Where, by any of the rules herein prescribed, one of two vessels shall keep out of the way, the other shall keep her course and speed.

Rule 21. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

Rule 22. Notwithstanding anything contained in these rules every vessel overtaking any other shall keep out of the way of the overtaken vessel.

Rule 23. In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied whenever required by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or, as provided in rule twenty-six:

One blast to mean, "I am directing my course to starboard."

Two blasts to mean, "I am directing my course to port."
But the giving or answering signals by a vessel required to

keep her course shall not vary the duties and obligations of the respective vessels.

[Steamers in narrow channels.]

Rule 24. That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.

Rule 25. In all channels less than five hundred feet in width, no steam vessel shall pass another going in the same direction unless the steam vessel ahead be disabled or signify her willingness that the steam vessel astern shall pass, when the steam vessel astern may pass, subject, however, to the other rules applicable to such a situation. And when steam vessels proceeding in opposite directions are about to meet in such channels, both such vessels shall be slowed down to a moderate speed, according to the circumstances.

[Direct signals.]

Rule 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerage-way, and, if necessary, stop and reverse.

[Immediate danger.]

Rule 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision

and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

[Neglect of precautions, etc.]

Rule 28. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

[Fine.]

Sec. 2. That a fine, not exceeding two hundred dollars, may be imposed for the violation of any of the provisions of this act. The vessel shall be liable for the said penalty, and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found.

[Authority to make regulations.]

Sec. 3. That the secretary of the treasury of the United States shall have authority to establish all necessary regulations, not inconsistent with the provisions of this act, required to carry the same into effect.

The board of supervising inspectors of the United States shall have authority to establish such regulations to be observed by all steam vessels in passing each other, not inconsistent with the provisions of this act, as they shall from time to time deem necessary; and all regulations adopted by the said board of supervising inspectors under the authority of this act, when approved by the secretary of the treasury, shall have the force of law. Two printed copies of any such regulations for passing, signed by them, shall be furnished to each steam vessel, and shall at all times be kept posted up in conspicuous places on board.

[Repeal of inconsistent rules.]

Sec. 4. That all laws or parts of laws, so far as applicable to the navigation of the Great Lakes and their connecting and tributary waters as far east as Montreal, inconsistent with the foregoing rules are hereby repealed.

Sec. 5. That this act shall take effect on and after March first, eighteen hundred and ninety-five.

Approved, February 8, 1895.

(5) MISSISSIPPI VALLEY RULES. (Rev. St. § 4233.)

The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States:

STEAM AND SAIL VESSELS.

Rule one. Every steam-vessel which is under sail, and not under steam, shall be considered a sail-vessel; and every steam-vessel which is under steam, whether under sail or not, shall be considered a steam-vessel.

LIGHTS.

Rule two. The lights mentioned in the following rules, and no others, shall be carried in all weathers, between sunset and sunrise.

Rule three. All ocean-going steamers, and steamers carrying sail, shall, when under way, carry—

(A) At the foremast head, a bright white light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, and so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side.

(B) On the starboard side, a green light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side.

(C) On the port side, a red light, of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, and so fixed as to throw the light from right ahead to two points abaft the beam on the port side.

The green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the lights, so as to prevent them from being seen across the bow.

Rule four. Steam-vessels, when towing other vessels, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam-vessels. Each of these mast-head lights shall be of the same character and construction as the mast-head lights prescribed by rule three.

Rule five. All steam-vessels, other than ocean-going steamers and steamers carrying sail, shall, when under way, carry on the starboard and port side-lights of the same character and construction and in the same position as are prescribed for side-lights by rule three, except in the case provided in rule six.

Rule six. River-steamers navigating waters flowing into the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: One red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe. Such lights shall show both forward and abeam on their respective sides.

Rule seven. (As amended March 3, 1893, 27 Stat. 557.) All coasting steam-vessels, and steam-vessels other than ferry-boats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers, or other inland waters of the United States, except those mentioned in rule six, shall carry the red and green lights, as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after-light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head light shall be so constructed as to show a good light through twenty points of the compass, namely; from right ahead to two points abaft the beam on either side of the vessel; and the after-light so as to show all around the horizon. The lights for ferry-boats, barges and canal boats when in tow of steam-vessels shall be regulated by such rules as the board of supervising inspectors of steam-vessels shall prescribe.

Rule eight. Sail-vessels, under way or being towed, shall carry the same lights as steam-vessels under way, with the exception of the white mast-head lights, which they shall never carry.

Rule nine. Whenever, as in case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

Rule ten. All vessels, whether steam-vessels or sail-vessels, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen,

but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile.

Rule eleven. (As amended March 3, 1897, 29 Stat. 689.) Sailing pilot-vessels shall not carry the lights required for other sailing-vessels, but shall carry a white light at the mast-head, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Steam pilot boats shall, in addition to the mast-head light and green and red side lights required for ocean steam vessels, carry a red light hung vertically from three to five feet above the foremast headlight, for the purpose of distinguishing such steam pilot boat from other steam vessels.

Rule twelve. Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels (but this rule shall be so construed as not to require row-boats and skiffs on the river St. Lawrence to carry lights).

Rule thirteen. Open boats shall not be required to carry the side-lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on one side and a red slide on the other side; and, on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, and in such a manner that the green light shall not be seen on the port side, nor the red light on the starboard side. Open boats, when at anchor or stationary, shall exhibit a bright white

light. They shall not, however, be prevented from using a flare-up, in addition, if considered expedient.

Rule fourteen. (As amended March 3, 1897, 29 Stat. 690.) The exhibition of any light on board of a vessel of war of the United States may be suspended whenever, in the opinion of the secretary of the navy, the commander in chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it. The exhibition of any light on board of a revenue cutter of the United States may be suspended whenever, in the opinion of the commander of the vessel, the special character of the service may require it.

FOG SIGNALS.

Rule fifteen. (As amended March 3, 1897, 29 Stat. 690.) Whenever there is a fog, or thick weather, whether by day or night, fog signals shall be used as follows:

(a) Steam vessels under way shall sound a steam whistle placed before the funnel, not less than eight feet from the deck, at intervals of not more than one minute. Steam vessels, when towing, shall sound three blasts of quick succession repeated at intervals of not more than one minute.

(b) Sail vessels under way shall sound a fog horn at intervals of not more than one minute.

(c) Steam vessels and sail vessels, when not under way, shall sound a bell at intervals of not more than two minutes.

(d) Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water-craft, navigating any bay, harbor, or river, by hand-power, horse-power, sail, or by the current of the river, or anchored or moored in or near the channel or fairway of any bay, harbor, or river, and not in any port, shall sound a fog-horn, or equivalent signal, which shall make a sound equal to a steam-whistle, at intervals of not more than two minutes.

STEERING AND SAILING RULES.

Rule sixteen. (As amended March 3, 1897, 29 Stat. 690.) Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change such risk should be deemed to exist.

Rule seventeen. (As amended March 3, 1897, 29 Stat. 690.) When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both vessels are running free, with the wind on the same side, the vessel which is to the windward shall keep out of the way of the vessel which is to the leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.

Rule eighteen. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Rule nineteen. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Rule twenty. If two vessels, one of which is a sail-vessel and the other a steam-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel.

Rule twenty-one. Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed.

Rule twenty-two. Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel.

Rule twenty-three. Where, by rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule twenty-four.

Rule twenty-four. In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger.

Rule twenty-five. (As amended March 3, 1897, 29 Stat. 690.) A sail vessel which is being overtaken by another vessel during the night shall show from her stern to such last-mentioned vessel a torch or flare-up light.

Rule twenty-six. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

(6) ACT MARCH 3, 1899. (30 STAT. 1152.)

Obstructions by anchoring vessels.

Sec. 15. That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or chan-

nels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for.

Penalties.

Sec. 16. That every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section thirteen of this act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the secretary of war, or who shall willfully injure or destroy any work of the United States contemplated in section four-

teen of this act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this act, shall be deemed guilty of a violation of this act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

Removal of obstructions to navigation.

Sec. 19. That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the secretary of war at his discretion, without liability for any damage to the owners of the same: provided, that in his discretion, the secretary of war may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a news-

paper published nearest to the locality of the obstruction, requiring the removal thereof: and provided also, that the secretary of war may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: provided, that such bidder shall give satisfactory security to execute the work: provided further, that any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the treasury of the United States.

Vessels grounding, etc.—Destruction of, etc.

Sec. 20. That under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any government canal or lock, or in any navigable waters mentioned in section nineteen, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the secretary of war, or any agent of the United States to whom the secretary may delegate proper authority, the secretary of war or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or de-

struction: provided, that the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: and provided further, that the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the treasury of the United States.

Such sum of money as may be necessary to execute this section and the preceding section of this act is hereby appropriated out of any money in the treasury not otherwise appropriated, to be paid out on the requisition of the secretary of war.

That all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this act are hereby repealed: provided, that no action begun, or right of action accrued, prior to the passage of this act shall be affected by this repeal.

3. THE LIMITED LIABILITY ACTS.

(1) ACT OF MARCH 3, 1851. (SECTIONS 4282-4289, REV. ST., WITH AMENDMENTS OF FEBRUARY 27, 1877, FEBRUARY 18, 1875, AND JUNE 19, 1886.)

4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owners of the vessel may be liable among the parties entitled thereto.

4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title (Rev. St. §§ 4131-4305) relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title (Rev. St. §§ 4131-4305) relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

4287. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

4288. Any person shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be

liable to the United States in a penalty of one thousand dollars.

4289. The provisions of the **seven** preceding sections, and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and **lighters**

(2) ACT JUNE 26, 1884, § 18. (23 STAT. 57.)

The individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending: provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners.

4. BONDS TO RELEASE VESSELS FROM ARREST.

Section 941, Rev. St. U. S. (as amended 30 Stat. 1354).

An act to amend section nine hundred and forty-one of the Revised Statutes.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that section nine hundred and forty-one of the Revised Statutes be, and the same is hereby, amended to read as follows:

"Sec. 941. When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. And the owner of any vessel may cause to be executed and delivered to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the court in which he is marshal, conditioned to answer the decree of said court in all or any cases that shall thereafter be brought in said court against the said vessel, and thereupon the execution of all such process against said vessel shall be stayed so long as the amount secured by such bond or stipulation shall be at least double the aggregate amount claimed by the libellants in such suits which shall be begun and pending against

said vessel; and like judgments and remedies may be had on said bond or stipulation as if a special bond or stipulation had been filed in each of said suits. The court may make such orders as may be necessary to carry this section into effect, and especially for the giving of proper notice of any such suit. Such bond or stipulation shall be endorsed by the clerk with a minute of the suits wherein process is so stayed, and further security may at any time be required by the court. If a special bond or stipulation in the particular cause shall be given under this section, the liability as to said cause on the general bond or stipulation shall cease."

Approved, March 3, 1899.

5. EVIDENCE IN THE FEDERAL COURTS.

No witness excluded on account of color or interest; provided, etc.

Sec. 858. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.

Mode of proof in equity and admiralty causes.

Sec. 862. The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein specially provided.

Depositions de bene esse.

Sec. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

Mode of taking depositions de bene esse.

Sec. 864. (As amended May 23, 1900, 31 Stat. 182.) Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined.

His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent.

Transmission to the court of depositions de bene esse.

Sec. 865. Every deposition taken under the two preceding sections shall be retained by the magistrate taking it until he delivers it with his own hand into the court for which it is taken; or it shall, together with the certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.

Depositions under a dedimus potestatem and in perpetuam.

Sec. 866. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in

perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five, shall not apply to any deposition to be taken under the authority of this section.

Depositions in perpetuam, etc., admissible at discretion of court.

Sec. 867. Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof.

Depositions under a *dedimus potestatem*, how taken.

Sec. 868. When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a *subpœna* for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the *subpœna*; and if any witness, after being duly served with such *subpœna*, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such *subpœna*, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of *subpœna* to testify issued by such court.

***Subpœna duces tecum* under a *dedimus potestatem*.**

Sec. 869. When either party in such suit applies to any judge of a United States court in such district or territory

for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner at the time and place stated in the subpœna, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as may be required by either of the parties.

Witness under a *dedimus potestatem*, when required to attend.

Sec. 870. No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt

for disobeying any subpoena directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at, the place of examination, are paid or tendered him at the time of the service of the subpoena.

Letters rogatory from United States courts.

Sec. 875. When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts.

Subpoenas for witnesses to run into another district.

Sec. 876. Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; provided, that in civil causes the witnesses living out of the district in which the court is held

do not live at a greater distance than one hundred miles from the place of holding the same.

Witnesses, form of subpoena; attendance under.

Sec. 877. Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

ACT OF MARCH 9, 1892.

An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States. (27 Stat. 7.)

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.

6. SUITS IN FORMA PAUPERIS.

(27 Stat. 252.)

An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give secu-

rity therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury as in other cases.

Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the case worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: provided, that the United States shall not be liable for any of the costs thus incurred.

Approved, July 20, 1892.

7. THE ADMIRALTY RULES OF PRACTICE.

(The Captions are Added for Convenience of Reference.)

Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction, on the Instance Side of the Court, in Pursuance of the Act of the 23d of August, 1842, chapter 188.

1.

[Process on filing libel.]

No mesne process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

2.

[Process in suits in personam.]

In suits in personam, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

3.

[Bail in suits in personam.]

In all suits in personam, where a simple warrant of arrest issues and is executed, the marshal may take bail, with

sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

4.

[Bond in attachment suits in personam.]

In all suits in personam, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

5.

[Bonds—Before whom given.]

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

6.

[Reduction of bail—New sureties.]

In all suits in personam, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

7.

[When special order necessary for warrant of arrest.]

In suits in personam, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

8.

[Monition to third parties in suits in rem.]

In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

9.

[Process in suits in rem.]

In all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or

other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

10.

[Perishable goods—How disposed of.]

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy in decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

11.

[Ship—How appraised or sold.]

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a

stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

12.

[Material-men—Remedies.]

In all suits by material-men for supplies or repairs, or other necessities, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam.

13.

[Seamen's wages—Remedies.]

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone in personam.

14.

[Pilotage—Remedies.]

In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone in personam.

15.

[Collision—Remedies.]

In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone in personam.

16.

[Assault or beating—Remedies.]

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.

17.

[Maritime hypothecation—Remedies.]

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either in rem or against the master or the owner alone in personam.

18.

[Bottomry bonds—Remedies.]

In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrong-doer.

19.

[Salvage—Remedies.]

In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed.

20.

[Petitory or possessory suits.]

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any

voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

21.

[Execution on decrees.]

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

22.

[Requisites of libel of information.]

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

23.

[Requisites of libel in instance causes.]

All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause,

civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, in rem or in personam (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

24.

[Amendments to libels.]

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

25.

[Stipulation for costs by defendant.]

In all cases of libels in personam, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the

court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

26.

[Claim—How verified.]

In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner, and that no other person is the owner thereof. And, where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

27.

[Answer—Requisites of.]

In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

28.

[Answer—Exceptions to.]

The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

29.

[Default on failure to answer.]

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

30.

[Effect of failure to answer fully.]

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken pro confesso against the defendant, to the full pur-

port and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

31.

[What defendant may object to answering.]

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense.

32.

[Interrogatories in answer.]

The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

33.

[How verification of answer to interrogatory obviated.]

Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

34.

[How third party may intervene.]

If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

35.

[How stipulation given by intervenor.]

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

36.

[Exceptions to libel.]

Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

37.

[Procedure against garnishee.]

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

38.

[Bringing funds into court.]

In cases of mariners' wages, or bottomry, or salvage, or other proceeding in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

39.

[Dismissal for failure to prosecute.]

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

40.

[Reopening default decrees.]

The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

41.

[Sales in admiralty.]

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

42.

[Funds in court registry.]

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

43.

[Claims against proceeds in registry.]

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and sum-

mary proceeding, to intervene *pro interesse suo* for delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

44.

[Reference to commissioners.]

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

45.

[Appeals.]

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty-days from the rendering of the decree.

46.

[Right of trial courts to make rules of practice.]

In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

47.

[Bail—Imprisonment for debt.]

In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state court.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a state court.

48.

[Answer in small claims.]

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

49.

[Further proof on appeal.]

Further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interroga-

tories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

50.

[Evidence on appeal.]

When oral evidence shall be taken down by the clerk of the district court, pursuant to the above-mentioned section of the act of congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect

51.

[Issue on new facts in answer.]

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

52.

[Record on appeal.]

The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, so that the same shall contain the following:

1. The style of the court.
2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.
3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.
4. The libel, with exhibits annexed thereto.
5. The pleadings of the defendant, with the exhibits annexed thereto.
6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.
7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.
8. Any order of the court to which exception was made.
9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.
10. The final decree.
11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.
2. All motions, rules, and orders not excepted to which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

2. The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

3. Hereafter, in making up the record to be transmitted to the circuit clerk on appeal, the clerk of the district court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

53.

[Security on cross-libel.]

Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

54.

[Limitation of liability—How claimed.]

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of shipowners and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or

before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post-office, or otherwise, as the court, in its discretion may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

55.

[Proof of claims in limited liability procedure.]

Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

56.

[Defense to claims in limited liability procedure.]

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as

aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of congress, or both.

57.

[Courts having cognizance of limited liability procedure.]

The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

58.

[Appeals in.]

All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of congress in that behalf, shall apply to the circuit courts of the United States where such cases are or shall be pending in said courts upon appeal from the district courts.

59.

[Right to bring in party jointly liable in collision case.]

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against in personam, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

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